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2509

No. 11807

United States

Circuit Court of Appeals

For the Ninth Circuit.

Z. E. EAGLESTON,

Appellant,

vs.

FRANK ROWLEY,

Appellee.

Transcript of Record

Upon Appeal from the District Court for the Territory of Alaska, Third Division

Rotary Colorprint, 870 Brannan Street, San Francisco 1-20-48—60

No. 11807

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS OF RECORD

GEORGE B. GRIGSBY,
Attorney at Law,
Anchorage, Alaska,

Attorneys for Z. E. Eagleston,
Defendant and Appellant.

HELLENTHAL AND HELLENTHAL,
Attorneys at Law,
Anchorage, Alaska,

Attorneys for Frank Rowley,
Plaintiff and Appellee. [1*]

*Page numbering appearing at foot of page of original certified Transcript.

In the District Court for the Territory of Alaska,
Third Division
No. A-4239

FRANK ROWLEY,

Plaintiff,

vs.

Z. E. EAGLESTON,

Defendant.

COMPLAINT

Comes now the plaintiff and complaints and alleges as follows:

I.

That on the 30th day of July, 1946, at Anchorage, Alaska, the defendant herein unlawfully, without cause or provocation, violently, wrongfully, wantonly, maliciously, grossly, deliberately and outrageously made an assault upon the plaintiff, and did then and there beat, wound and injure, by striking, the said plaintiff, first with his, the defendant's fists, and then by striking said plaintiff one or more blows on the head with an instrument which plaintiff is informed was a heavy iron No. 2 shovel, an instrument or weapon calculated to inflict great bodily injury; that plaintiff thereby was wounded, suffering a depressed compound fracture of his skull, laceration and destruction of his brain, and the deposit therein of a metal, foreign body, and hair, bone and dirt, and is, and for a long time will be sick, and has suffered and still suffers great bodily pain, discomfort and mental suffering from said wounds; that plaintiff was seriously and severely injured and disabled thereby and confined

to Providence Hospital, Anchorage, Alaska, therefrom, for a period of twenty-nine (29) days, and is, at the time of making this complaint, and will be for many months to come, totally disabled and unable to perform any work or services; that in the treatment and necessary care of said wounds he has incurred hospitals bills [2] in the sum of Six Hundred Fifty-seven and 25/100 Dollars ($657.25), and for physician's services in the sum of Two Thousand Five Hundred Dollars ($2,500.00); that plaintiff has been injured in the premises in the sum of Thirty Thousand Dollars ($30,000.00).

Wherefore, Plaintiff demands judgment for Fifty-five Thousand Dollars ($55,000.00); Thirty Thousand Dollars ($30,000.00) actual damages and Twenty-five Thousand Dollars ($25,000.00) exemplary damages and for the costs of this action.

/s/ FRANK ROWLEY.

United States of America,
Territory of Alaska—ss.

Frank Rowley, first being duly sworn, upon his oath, deposes and says: I am the plaintiff in the foregoing complaint; I have read said complaint; know the contents thereof, and the matters therein set forth are true, as I verily believe.

/s/ FRANK ROWLEY.

Subscribed and sworn to before me this 10th day of September, 1946.

[Seal] /s/ R. J. GROVER,
Notary Public for Alaska.

My Commission Expires 3/25/48.

[Endorsed]: Filed Sept. 11, 1946.

[Title of District Court and Cause.]

ANSWER

Comes now Z. E. Eagleston, the above named defendant, and denies each and all of the allegations contained in plaintiff's Complaint.

DAVIS & RENFREW,
Of Attorneys for Defendant.
By /s/ WILLIAM W. RENFREW.

United States of America,
Territory of Alaska—ss.

Z. E. Eagleston, being first duly sworn, upon his oath, deposes and says:

That he is the defendant named in the within and foregoing Answer, that he has read said Answer, knows the contents thereof and that the same is true as he verily believes.

/s/ Z. E. EAGLESTON.

Subscribed and sworn to before me this 5th day of November, 1946.

/s/ WILLIAM W. RENFREW,
Notary Public in and for the Territory of Alaska.
My Commission Expires 8/1/49.

[Endorsed]: Filed Nov. 5, 1946.

[Title of District Court and Cause.]

AMENDED COMPLAINT

Comes now the plaintiff and complains and alleges as follows:

I.

That on the 30th day of July, 1946, at Anchorage, Alaska, the defendant herein unlawfully, without cause or provocation, violently, wrongfully, wantonly, maliciously, grossly, deliberately and outrageously made an assault upon the plaintiff, and did then and there beat, wound and injure, by striking said plaintiff one or more blows on the head with an instrument which plaintiff is informed was a long-handled garden rake, an instrument or weapon calculated to inflict great bodily injury; that plaintiff thereby was wounded, suffering a depressed compound fracture of his skull, laceration and destruction of his brain, and the deposit therein of a metal, foreign body, and hair, bone and dirt, and is, and for a long time will be sick, and has suffered and still suffers great bodily pain, discomfort and mental suffering from said wounds; that plaintiff was seriously and severely injured and disabled thereby and confined to Providence Hospital, Anchorage, Alaska, therefrom, for a period of twenty-nine (29) days, and is, at the time of making this complaint, and will be for many months to come, totally disabled and unable to perform any work or services; that in the treatment and necessary care of said wounds he has incurred hospital bills in the sum of Six Hundred Fifty-

seven and 25/100 Dollars ($657.25), and for physician's services in the sum of Two Thousand Five Hundred Dollars ($2,500.00); that plaintiff has been injured [5] in the premises in the sum of Fifty Thousand Dollars ($50,000.00).

Wherefore, Plaintiff demands judgment for Seventy-five Thousand Dollars ($75,000.00), Fifty Thousand Dollars ($50,000.00) actual damages and Twenty-five Thousand Dollars ($25,000.00) exemplary damages, and for the costs of this action.

/s/ FRANK ROWLEY.

United States of America,
Territory of Alaska—ss.

Frank Rowley, first being duly sworn, upon his oath, deposes and says: I am the Plaintiff in the foregoing Amended Complaint; I have read said Amended Complaint, know the contents thereof, and the matters therein set forth are true, as I verily believe.

/s/ FRANK ROWLEY.

Subscribed and sworn to before me this 6th day of December, 1946.

[Seal] /s/ JEAN E. McCABE,
Notary Public for Alaska.

My Commission Expires 10/16/50.

Service by receipt of copy of the above Amended Complaint hereby acknowledged this 6th day of December, 1946.

/s/ GEORGE B. GRIGSBY,
Attorney for Defendant.

[Endorsed]: Filed Dec. 6, 1946. [6]

[Title of District Court and Cause.]

MOTION FOR NEW TRIAL

Comes now the defendant in the above entitled action, and moves the court that the judgment and decision of the court heretofore rendered in the above entitled action be set aside and a new trial granted on the following grounds:

I.

Insufficiency of the evidence to justify the judgment and decision.

That the judgment and decision is against law.

/s/ GEORGE B. GRIGSBY,
Attorney for Defendant. [7]

[Title of District Court and Cause.]

Minute Order, December 27, 1946

DENYING MOTION FOR NEW TRIAL

Now at this time the plaintiff not being present in court but represented by John S. Hellenthal of his counsel, the defendant being present in court and represented by his counsel George B. Grigsby and W. N. Cuddy, and the Court being fully and duly advised in the premises,

It Is Ordered that defendant's motion for new trial in cause No. A-4239, entitled Frank Rowley, plaintiff, versus Z. E. Eagleston, defendant, be, and it is hereby denied.

[Endorsed]: Entered Court Journal No. g-13, Page No. 418, Dec. 27, 1946.

[Title of District Court and Cause.]

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause came on regularly for trial on the 9th day of December, 1946, before the above-entitled Court without a jury, a jury trial having been duly waived by the parties, and the firm of Hellenthal & Hellenthal appearing as attorneys for plaintiff, and Warren Cuddy, Esq., and George Grigsby, Esq., for defendant, and from the evidence introduced, and the Court having considered the stipulation of the parties, the Court finds the facts as follows, to-wit:

Findings of Fact

I.

That on the 30th day of July, 1946, at Anchorage, Alaska, the defendant herein unlawfully, without cause or provocation, violently, wrongfully, maliciously and deliberately made an assault upon the plaintiff, and did then and there beat, wound and injure, by striking said paintiff one or more blows on the head with an instrument which plaintiff was informed and the Court hereby finds was a long-handled garden rake, an instrument calculated to inflict great bodily injury; that plaintiff thereby was wounded, suffering a depressed compound fracture of his skull, laceration and destruction of his brain, and the deposit therein of a metal foreign body, and hair, bone and dirt.

II.

That plaintiff was seriously and severely injured and disabled [9] thereby, suffering great bodily pain, discomfort and mental suffering from said wounds, and confined to Providence Hospital, Anchorage, Alaska, therefrom, for a period of twenty-nine (29) days, and was totally disabled from the date of said injury, or July 30th, 1946, until the time of the trial in this matter; and that said plaintiff will be disabled therefrom for many months to come and unable to perform any work or services, and will suffer pain, discomfort and mental suffering therefrom for many months to come; that in the treatment and necessary care of said wounds, plaintiff incurred hospital bills in the sum of Seven-hundred forty-four and 25/100 Dollars ($744.25), and bills for physician's services in the sum of Seven-hundred and Fifty Dollars ($750.00).

III.

That plaintiff has been injured in the premises in the amount of Thirty-seven Thousand Dollars ($37,000.00), all, in actual or compensatory damages; that there is now due and owing the plaintiff from the said defendant, Z. E. Eagleston, the sum of Thirty-seven Thousand Dollars ($37,000.00), with interest thereon at the rate of six per cent (6%) per annum from date of judgment until paid.

IV.

That in the ascertainment of the above amount of Thirty-seven thousand Dollars, no account is taken of the loss of profits from the operation of

plaintiff's Mountain View power distribution system, or of the prevention of the operation thereof that may or may not result; that in the fixing of said amount of Thirty-seven Thousand Dollars, pages 430, 431, 432, 456 and 457 of Plaintiff's Exhibit No. 128, or "New York Life Insurance Company, Premium Rates and Policy Values," including Miscellaneous Tables, the "American Experience Table of Mortality," and tables of "Life Annuities" were considered; that in the fixing of said amount of Thirty-seven Thousand Dollars, pages 534 to 540, inclusive, sub-entitled "Fracture of the Skull," of "A Textbook of Clinical Neurology, with an Introduction on the History of Neurology," by Israel S. Wechsler, M. D., Fifth Edition, Revised, 1944, W. B. Saunders Company, were considered.

Conclusions of Law

As a conclusion of law from the foregoing facts, the Court finds that Plaintiff is entitled to judgment in the sum of Thirty-seven Thousand Dollars ($37,000.00), with interest thereon at the rate of six per cent (6%) per annum from date hereof until paid, in current lawful money of the United States, and costs of suit; and

It is hereby Ordered, Adjudged and Decreed that Judgment be entered accordingly and that counsel for plaintiff submit appropriate judgment in accordance herewith.

Dated this 27th day of December, 1946.

/s/ ANTHONY J. DIMOND,
District Judge.

[Endorsed]: Filed Dec. 27, 1946. [11]

In the District Court for the Territory of Alaska,
Third Division

No. A-4239

FRANK ROWLEY,

Plaintiff,

vs.

Z. E. EAGLESTON,

Defendant.

JUDGMENT

This cause came on regularly for trial on the 9th day of December, 1946, before the above-entitled Court without a jury, a jury trial having been duly waived by parties, and the firm of Hellenthal & Hellenthal appearing as attorneys for plaintiff, and Warren Cuddy, Esq., and George Grigsby, Esq., for defendant, and the Court having heard the testimony and having examined the proofs offered by the respective parties, and the Court having considered the stipulation of the parties, and the Court being fully advised in the premises, and Findings of Fact and Conclusions of Law having been filed herein, and the Court having directed that Judgment be entered in accordance therewith, Now, Therefore, by reason of the law and findings aforesaid,

It Is Hereby Ordered, Adjudged and Decreed:

1. That plaintiff have judgment against the defendant in the sum of Thirty-seven Thousand Dollars ($37,000.00), with interest thereon at the rate of six per cent (6%) per annum from date hereof until paid;

2. That Plaintiff have judgment against the defendant for his costs herein incurred.

Dated this 27th day of December, 1946.

/s/ ANTHONY J. DIMOND,
District Judge.

[Endorsed]: Filed Dec. 27, 1946.

[Title of District Court and Cause.]

EXCEPTIONS

To the Findings of Fact made and entered herein on the 27th day of December, 1946, the defendant excepts as follows:

To Finding of Fact No. I,—on the ground there was insufficient evidence introduced at the trial on which to base said finding.

Defendant excepts to Finding of Fact No. II,—on the ground that there was insufficient evidence introduced at the trial to support said finding.

Defendant excepts to Finding of Fact No. III, wherein the Court finds that plaintiff has suffered damage in the amount of Thirty-seven Thousand Dollars ($37,000.00),—on the ground that there is insufficient evidence introduced at the trial of said action to support such finding, and on the ground that such finding was based partially upon improper evidence as detailed in paragraph IV, of said Findings of Fact.

To the Conclusions of Law filed herein on the 27th day of December, 1946, defendant excepts on the ground that said Conclusions of Law wherein and whereby the Court found that plaintiff was entitled to judgment against the defendant in the sum of Thirty-seven Thousand Dollars ($37,000.00), and certain interest, are based on erroneous Findings of Fact not supported by the evidence in the case. [13]

Defendant excepts to the judgment rendered herein on the 27th day of December, 1946, wherein and whereby the plaintiff was awarded judgment against the defendant in the sum of Thirty-seven Thousand Dollars ($37,000.00), with certain interest and costs on the ground that said judgment is excessive and not justified by the evidence introduced on the trial of said action.

/s/ GEORGE B. GRIGSBY,
Attorney for Defendant.

The foregoing Exceptions are hereby Allowed this 13th day of March, 1947.

/s/ ANTHONY J. DIMOND,
District Judge.

[Endorsed]: Filed Mar. 13, 1947. [14]

[Title of District Court and Cauce.]

PETITION FOR ALLOWANCE OF APPEAL

The above-named defendant, conceiving himself aggrieved by the judgment made and entered on the 27th day of December, 1946, in the above-entitled cause, wherein and whereby judgment was rendered in favor of the plaintiff and against said defendant in the sum of Thirty-Seven Thousand Dollars ($37,000.00), with interest thereon at the rate of six per cent (6%) per annum from the date of said judgment until paid, and for plaintiff's costs incurred in said action, does hereby appeal from said judgment to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the Assignment of Errors which is filed herewith, and said defendant prays that the appeal be allowed; that a citation may issue herein; and that a transcript of the record proceedings and papers in said cause be sent to the said Appellate Court.

Petitioner further prays that a supersedeas may be granted herein pending a final disposition of the cause upon the defendant filing a supersedeas and cost bond in such amount as may be fixed by the order allowing the appeal.

Dated March 13, 1947.

/s/ GEORGE B. GRIGSBY,
Attorney for Defendant.

Service Admitted this 13th day of March, 1947.

/s/ JOHN S. HELLENTHAL,
Attorney for Plaintiff.

[Endorsed]: Filed Mar. 13, 1947. [15]

[Title of District Court and Cause.]

ASSIGNMENT OF ERRORS

Now comes the defendant and appellant herein and files the following Assignment of Errors, upon which you will rely in the prosecution of his appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment made and entered herein on the 27th day of December, 1946.

I.

The Court erred in overruling the "Motion for a Change of Venue" on file herein.

II.

The Court erred in admitting in evidence on the part of the plaintiff, "Plaintiff's Exhibit .....," being a publication called, "New York Life Insurance Company, Premium Rates and Policy Values," including "Miscellaneous Tables" the "American Experience Table of Mortality," and tables of "Life Annuities," the defendant having objected to the admission of said publication to which ruling the defendant excepted and exception was allowed.

III.

The Court erred in its Findings of Fact and Conclusions of Law, as follows:

(a) In finding in Findings of Fact No. I,— "That on the 30th day of July, 1946, at Anchorage, Alaska, the defendant herein unlawfully, without cause of provocation, violently, wrongfully, [16]

maliciously and deliberately made an assault upon the plaintiff, and did then and there beat, wound and injure, by striking said plaintiff one or more blows on the head with an instrument which plaintiff was informed and the Court hereby finds was a long-handled garden rake, an instrument calculated to inflict great bodily injury; that plaintiff thereby was wounded, suffering a depressed compound fracture of his skull, laceration and destruction of his brain, and the deposit therein of a metal foreign body, and hair, bone and dirt."

(b) In finding in Findings of Fact No. II,—"That plaintiff was seriously and severely injured and disabled thereby, suffering great bodily pain, discomfort and mental suffering from said wounds, and confined to Providence Hospital, Anchorage, Alaska, therefrom, for a period of twenty-nine (29) days, and was totally disabled from the date of said injury, or July 30th, 1946, until the time of the trial in this matter; and that said plaintiff will be disabled therefrom for many months to come and unable to perform any work or services, and will suffer pain, discomfort and mental suffering therefrom for many months to come; that in the treatment and necessary care of said wounds, plaintiff incurred hospital bills in the sum of Seven Hundred Forty-four and 25/100 Dollars ($744.25), and bills for physician's services in the sum of Seven Hundred Fifty Dollars ($750.00)."

(c) In finding in Findings of Fact No. III,—"That plaintiff has been injured in the premises in the amount of Thirty-seven Thousand Dollars ($37,-

000.00), all, in actual or compensatory damages; that there is now due and owing the plaintiff from the said defendant, Z. E. Eagleston, the sum of Thirty-seven Thousand Dollars ($37,000.00), with interest thereon at the rate of six per cent per annum from date of judgment until paid." [17]

And that the Court erred in forming its Conclusions of Law, as follows: "As a conclusion of law from the foregoing facts, the Court finds that Plaintiff is entitled to Judgment in the sum of Thirty-seven Thousand Dollars ($37,000.00), with interest thereon at the rate of six per cent (6%) per annum from date hereof until paid, in current lawful money of the United States, and costs of suit; and

"It is hereby Ordered, Adjudged and Decreed that Judgment be entered accordingly and that counsel for plaintiff submit appropriate judgment in accordance herewith:"

And to each of which said Findings of Fact and Conclusions of Law the defendant excepted and said exceptions allowed.

IV.

That the Court erred in rendering judgment in favor of the plaintiff and against the defendant in the sum of Thirty-seven Thousand Dollars ($37,000.00), and certain interest and costs. The Court's error in this regard is based upon all the errors assigned, to-wit—Assignments of Errors numbers I, II, III, and IV, inclusive, and on the ground that said judgment is excessive and not justified by the evidence introduced in the trial of said cause, to which judgment the defendant excepted and exception was allowed.

Wherefore, defendant and appellant prays that the judgment in the above-entitled cause be reversed and the cause remanded with instructions to the Trial Court as to further proceedings therein, and for such other and further relief as may be just in the premises.

Dated this 13th day of March, 1947.

Service admitted this 13th day of March, 1947.

/s/ GEORGE B. GRIGSBY,
Attorney for Defendant and Appellant.

.....
Attorney for Plaintiff.

[Endorsed]: Filed Mar. 13, 1947. [18]

[Title of District Court and Cause.]

ORDER ALLOWING APPEAL AND SUPERSEDEAS

The petition of Z. E. Eagleston, defendant, in the above-entitled cause for an appeal from the final judgment rendered therein, is hereby granted, and the appeal is allowed, and upon the petitioner filing a bond in the sum of Forty Thousand Dollars ($40,000.00), with sufficient sureties and conditioned as required by law, the same shall operate as a supersedeas of the judgment made and entered in the above cause, and shall suspend and stay all further

proceedings in this Court until the termination of said appeal by the United States Circuit Court of Appeals for the Ninth Circuit.

Dated: March 13, 1947.

/s/ ANTHONY J. DIMOND,
District Judge.

Service admitted this 13th day of March, 1947.

.....
Attorney for Plaintiff.

[Endorsed]: Filed Mar. 13, 1947.

[Title of District Court and Cause.]

CITATION ON APPEAL

To the plaintiff, Frank Rowley, and to his attorneys, Hellenthal and Hellenthal:

You, and each of you, are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, in the State of California, thirty (30) days from the date of the within Citation, pursuant to the Order Allowing Appeal on file in the Clerk's office of the District Court for the Territory of Alaska, Third Division, and in that certain action pending in said District Court entitled, Frank Rowley, plaintiff, vs. Z. E. Eagleston, defendant, being No. A-4239, in the files of said District Court, and wherein Z. E. Eagleston is appellant, and you are

appellee, to show cause, if any there be, why the judgment rendered against Z. E. Eagleston should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witnessed by the Honorable Anthony J. Dimond, Judge of the District Court for the Territory of Alaska, Third Division, this 13th day of March, 1947.

/s/ ANTHONY J. DIMOND,
Judge of the District Court for the Territory of Alaska, Third Division.

Service admitted this 13th day of March, 1947.

/s/ JOHN S. HELLENTHAL,
Attorney for Plaintiff.

[Endorsed]: Filed Mar. 13, 1947. [20]

[Title of District Court and Cause.]

PRESENTATION OF BILL OF EXCEPTIONS

Now at this time, George B. Grigsby, of counsel for defendant in the cause of Frank Rowley, plaintiff, versus Z. E. Eagleston, defendant, cause No. A-4239, announced to the Court that he had served and filed the defendant's proposed bill of exceptions to be used on appeal of said cause heretofore taken, and now withdrew the proposed bill of exceptions from the Clerk's file and presented the same to the Judge in open court, praying that the same be allowed and settled.

Entered Court Journal No. g-14, Page No. 263, May 13, 1947. [21]

[Title of District Court and Cause.]

Minute Order, May 21, 1947

GRANTING ADDITIONAL TIME IN WHICH TO DOCKET RECORD ON APPEAL

Now at this time, on oral motion of George B. Grigsby, counsel for the defendant,

It Is Ordered that defendant be, and he is hereby, granted an extension in time to July 15, 1947, in which to docket the record on appeal in cause No. A-4239, entitled Frank Rowley, plaintiff, versus Z. E. Eagleston, defendant, with the Circuit Court of Appeals.

Entered Court Journal No. g-14, Page No. 293, May 21, 1947. [22]

[Title of District Court and Cause.]

Minute Order, July 12, 1947

EXTENDING TIME 40 DAYS FROM TIME HERETOFORE GRANTED, TO DOCKET RECORD IN CIRCUIT COURT OF APPEALS FOR NINTH CIRCUIT

Now at this time, on oral motion of George B. Grigsby, counsel for the defendant,

It Is Ordered that defendant be, and he is hereby granted an extension of 40 days from time heretofore granted, to docket the record on appeal in cause No. A-4239, entitled Frank Rowley, plaintiff, versus Z. E. Eagleston, defendant, with the Circuit Court of Appeals for the 9th Circuit.

Entered Court Journal No. g-14, Page No. 318, July 12, 1947. [23]

[Title of District Court and Cause.]

Minute Order, August 22, 1947

EXTENDING TIME WITHIN WHICH TO DOCKET CAUSE WITH CIRCUIT COURT OF APPEALS

Now at this time upon motion of George B. Grigsby, counsel for defendant,

It Is Ordered that the time within which appellant in cause No. A-4239, entitled Frank Rowley, plaintiff, versus Z. E. Eagleston, defendant, may docket cause with Circuit Court of Appeals, be, and it is hereby extended forty days from August 25, 1947, and plaintiff required to file his proposed amendments to the bill of exceptions within ten days.

Entered Court Journal No. g-15, Page No. 60, August 22, 1947. [24]

[Title of District Court and Cause.]

Minute Order, September 23, 1947

EXTENDING TIME WITHIN WHICH TO DOCKET CAUSE WITH CIRCUIT COURT OF APPEALS

Now at this time upon motion of George B. Grigsby, counsel for defendant, and with John S. Hellenthal, of counsel for plaintiff not objecting thereto,

It Is Ordered that defendant be, and he hereby is, granted extension of time up to and including October 26, 1947, within which to docket cause No. A-4239, entitled Frank Rowley, plaintiff, versus Z. E. Eagleston, defendant, with the Ninth Circuit Court of Appeals.

Entered Court Journal No. g-15, Page No. 127, September 23, 1947. [25]

[Title of District Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD

To the Clerk of the District Court, Third Division, Alaska:

You are hereby requested to make transcript of record in the above-entitled action to be filed in the United States Circuit Court of Appeals for the Ninth Circuit, pursuant to an appeal taken in said cause, and to include in such transcript the following papers of record in said cause:

1. Complaint.
2. Answer.
3. Amended complaint.
4. Motion for New Trial.
5. Minute Order, Dec. 27th, 1946, denying New Trial.
6. Findings of Fact and Conclusions of Law.
7. Judgment.

8. Exceptions to Findings of Fact, Conclusions of Law and Judgment.

9. Petition for Allowance of Appeal.

10. Assignments of Error.

11. Order allowing Appeal and Supersedeas.

12. Citation.

13. Minute Order of May 13, 1947, Presentation of Bill of Exceptions.

14. Minute Order, May 21st, 1947, extending time to docket Record on Appeal. [26]

15. Minute Order July 12, 1947, extending time to docket Record on Appeal.

16. Minute Order Aug. 22, 1947, extending time to docket Record on Appeal.

17. Minute Order Sept. 23, 1947, extending time to docket Record on Appeal.

18. Bill of Exceptions.

19. This Praecipe.

/s/ GEORGE B. GRIGSBY,
Attorney for Defendant and Appellant.

Service admitted this 14th day of October, 1947.

/s/ JOHN S. HELLENTHAL,
Attorney for Plaintiff and Appellee.

[Endorsed]: Filed Oct. 1, 1947. [27]

[Title of District Court and Cause.]

BILL OF EXCEPTIONS

Be It Remembered:

This cause came on regularly for trial at ten o'clock a.m., Monday, December 9, 1946, before the above-entitled Court at Anchorage, Alaska, and the following proceedings were had:

George B. Grigsby, attorney for the defendant, presented a motion supported by affidavits for a change of venue, which motion was overruled by the Court, to which ruling defendant excepted and exception was allowed.

And, thereupon, George B. Grigsby objected to going to trial before the present jury panel as supplemented by a special venire returnable at 2:00 o'clock p.m. of said day, on the grounds stated in the motion for a change of venue, and on the ground that the special venire was composed of residents of Anchorage and vicinity, and on the ground that in drawing the special venire the names of persons living at a distance from Anchorage were rejected and thrown out as being residents of places too remote to be conveniently subpoenaed, which objection was overruled, to which ruling defendant excepted and the exception was allowed. [28]

And George B. Grigsby, attorney for the defendant, then called the Court's attention to a motion for an Order of Examination, dated and served on attorneys for plaintiff on 7 December, 1946, and filed with the Court 9 December, 1946, which mo-

tion was made for the purpose of having the plaintiff submit to an examination by certain physicians to be appointed by the Court. Whereupon, [29] the plaintiff's attorneys consented to having the plaintiff submit to an examination before physicians to be appointed by the Court. Whereupon the Court appointed the following physicians to make said examination: Doctors A. S. Walkowski, R. B. Coffin and George G. Davis.

And, thereupon the following proceedings were had:

Mr. Grigsby: Now, if the Court please, counsel for the defendant offers to stipulate that this case be tried before the Court; and, further, that the Court, having heard the evidence in the criminal case, that no evidence need be submitted as far as we are concerned except on the question of damages.

Mr. Hellenthal: I wasn't quite clear about that. You say no evidence except evidence of damages?

Mr. Grigsby: On the question of damages, yes.

Mr. Hellenthal: I would like time to consult with my client before entering into any such stipulation.

Court: Well, let me finish this order. Order for physical examination has been signed and may be entered.

Court will stand in recess until 11 o'clock.

(Whereupon recess was had at 10:50 o'clock a.m.)

After Recess

(Jurors on panel were excused until 2 o'clock p.m.)

(Twenty additional names were drawn for the regular panel.)

(Recess was then had until 2 o'clock p.m.)

Afternoon Session

The Court: Before proceeding further, I inquire of counsel whether anything further has been done along the lines indicated when Court recessed this morning?

Mr. Hellenthal: There is a matter that counsel for the plaintiff would like to take up before the Court in connection with that same subject. I believe it should be taken up in the absence of the jurors.

The Court: Well, we have so many jurors here that it is obviously impossible [30] to find space for them elsewhere, and so I suggest that counsel and the parties, if they desire, come in chambers and the reporter will be in attendance and we can do everything there that we could do in open court.

Ladies and Gentlemen: You who have been drawn for the jury—will you kindly remain here in the court room until the return of the Court since it is desired that the Court discuss, out of the hearing of the jurors, a matter concerning the case which has been set for trial today.

The Court will stand in recess for conference in chambers.

(Following conference in chambers, the following proceedings were had in open court:)

The Court: In the case of Frank Rowley, plaintiff, vs. Z. E. Eagleston, defendant, No. A-4239, it is my understanding that counsel for the respective parties have stipulated, and they do now stipulate in open court, to waive trial of the case by jury, and they do consent and request that the case be tried by the Court without a jury; and that the Court shall consider as being in evidence and before the Court all of the testimony and evidence given in the trial of the Criminal case of United States of America vs. Z. E. Eagleston, which was tried before a jury and in which a verdict was rendered some days ago; and that either of the parties may adduce other evidence—additional evidence—bearing upon the physical condition of Mr. Rowley, or relating to damages, as well as evidence upon any other feature of the case which counsel for either party may think was not adequately covered by testimony and evidence given in the criminal case.

Does counsel for the plaintiff so stipulate?

Mr. Hellenthal: We do, your Honor.

The Court: Does counsel for defendant so stipulate?

Mr. Grigsby: We do, your Honor.

The Court: Very well, the case will be tried in that fashion. And the trial will go on—I understand this is agreeable to the parties—at 10 o'clock tomorrow morning. Although one of the parties had wished to go on this afternoon, I believe to go

forward with the proof this afternoon—I believe it would be better, in view of the provisions made for the physical examination of the plaintiff under an order entered by consent and signed this morning, that it would be better to defer the taking of all testimony [32] until tomorrow morning at 10 o'clock.

Therefore, an order will now be made to set down the case for trial for the taking of additional evidence tomorrow morning at 10 o'clock.

And, thereafter, on Tuesday, December 10th, 1946, the following proceedings were had:

MRS. LAURA M. FEEHAN

a witness called on behalf of plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Hellenthal:

My name is Mrs. Laura M. Feehan. My occupation is X-ray work and laboratory work in the Providence Hospital here. I was engaged in such work on the 30th of July, 1946; have been so engaged at the Providence Hospital since that date. I took X-rays of Frank Rowley at the request of Dr. Romig. I have the X-rays that I took of Frank Rowley. Until the moment I came to this courtroom they were in our files at the Providence Hospital. I would judge there are a dozen of them. They are the same X-rays that were given to a Board of Doctors yesterday for their use in con-

(Testimony of Mrs. Laura M. Feehan.)
sidering the condition of Mr. Rowley. The X-ray photographs were offered and admitted in evidence without objection, and being fourteen (14) in number, were marked "Plaintiff's Exhibits numbers 100 to 113, inclusive.

And thereupon,

ARCHIE L. BROWN

a witness called on behalf of plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Hellenthal:

My name is Archie L. Brown. On July 30, 1946, I was Acting Identification Officer of the Anchorage Police Department. On that day I took some pictures of Mr. Rowley while he was undergoing an operation at Providence Hospital. I have those pictures with me. Those are the pictures I took of Mr. Rowley on the 30th day of July at Providence Hospital. They truly represent the scenes that I attempted to photograph on that day. These photographs were taken in the presence of Doctor Romig, Dr. Flora, and the nurse, Miss Sally Hart, and one other nurse whose name I do not know. Photographs described admitted in evidence without objection, and marked "Plaintiff's Exhibits Nos. 114-123, inclusive.

And thereupon,

HOWARD G. ROMIG

a witness called in behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Hellenthal:

My name is Howard Glenmore Romig; I am a physician and surgeon; I went to Stanford Medical School, and finished in 1934; I studied two years in the San Francisco County Hospital, the last year of which I was house officer and surgeon; have practiced in Anchorage since 1936, except for three (3) years which I spent in the Navy; I do not have any specialties; my two years in post graduate work at Stanford University and San Francisco were more in surgery than anything else. [34]

I know Frank Rowley. On the 30th of July, 1946, I attended Mr. Rowley for a head injury; subsequently I have watched him. The last date I examined him was yesterday, in part, and at Providence Hospital, and in the presence of three other doctors. On July 30th of this year he was suffering from a compound, comminuted, depressed fracture of the skull; a compound means that the wound was communicating to the outside; comminuted means there were a multitude of fragments; depressed means these fragments were shoved down into the brain substance. In addition to treating him for the fractures I have outlined I have treated him for laceration of the brain, laceration of the dura, hemorrhage, shock, laceration of the scalp.

(Testimony of Howard G. Romig.)

On the morning of the 30th of July, 1946, at 10:20 a.m., I took Mr. Rowley as a patient from Dr. Davis who had been called in attendance by someone else. Before going to surgery Mr. Rowley was given tetanus antitoxin, gangrene antitoxin; was started on penicillin and sulpha; was brought out of a small degree of shock and prepared for surgery. About one o'clock—one-thirty—he was taken to the operating room where I extended the laceration into an incision reaching from the front of his scalp to the mid-back portion of the scalp. I also extended it laterally sufficient to allow me to operate on the fracture I have described before—the brain tissue that was injured as I have described before.

(Witness handed a photograph, being Plaintiff's Exhibit No. 8, in the case of U. S. vs. Eagleston, No. 1986-Cr., and witness exhibiting photograph to the Court and continuing:)

This laceration between the tips of these two instruments was there when I first was called to attend Mr. Rowley. This laceration existed at the time I was called [35] to attend the patient. In order to operate on the underlying damaged bone and brain I had to extend the incision forward, backward and laterally.

The Court: Which is the original?

Witness: Between the tips of the instrument here. Having exposed the fractured skull, and the herniated, destroyed brain tissue which exuded from

(Testimony of Howard G. Romig.)

the wound, I removed considerable number of small fragments of bone from Mr. Rowley's brain. Adhering to these fragments of bone was hair in almost every instance. I also removed a total of about two-thirds of one ounce by volume of destroyed brain tissue. I controlled the bleeding by tying two large veins. Those veins were underneath the dura and lying next to the brain. I cleaned the wound by irrigating it, sutured the dura over the defect in the brain. The dura may be called the tough covering—tough tissue covering to the outer portion of the brain. I replaced then, on top of the dura, as many bone fragments as I was able to clean and make acceptable for use. A good number of the bone fragments had to be thrown away, that is to say, they could not be replaced in the hope that they would grow over the defect in the man's skull. A great many of these fragments lay in the brain substance itself—completely through the dura and in the brain substance. The deepest fragment removed from his brain was one and one-quarter inch below the outer table of bone—one and one-quarter inch below the outside of the skull. These fragments were located in the frontal parietal area. I stitched the dura and covered the dura with bone, then I sutured the scalp, and then took the man to his room. X-rays had been ordered before the operation by either Dr. Davis or Dr. Coffin, I do not know which. They were at hand and I used them. The two exhibits, Plaintiff's [36] Exhibits

(Testimony of Howard G. Romig.)

No. 12 and 13 in the said case of United States vs. Eagleston, are the X-rays that were present on the morning of the 30th when I made this operation. I can analyze those X-rays and show the Court and the parties.

The Court: Do you want that machine?

Witness: Could you bring it up here and I will show it to the Judge?

The Court: Better put it up on the desk here. If counsel desire to stand behind while the doctor is explaining they may do so.

Witness (continuing): This is a P.A. view. The *E*-rays passed through the man's back of his skull to the forward part of his skull and it shows here this multitude of fragments in this particular area of the skull, and it also shows the thin fracture line running from his frontal area, just above his nose, up to this comminuted area and then backwards to the vortex of his skull—so far as this particular view will show the fracture running.

The Court: How can you tell whether that thin fracture is in the front or back?

Witness: In this particular instance the forward part of his skull rested near the X-ray and that is sufficient to throw that fracture on to the film, whereas others from the back of his skull did not show up. On a subsequent date we took other X-rays and did actually show that this same fracture had run completely back into the back of his skull.

(Testimony of Howard G. Romig.)

Illustrating on the exterior of my own head, this fracture runs from Mr. Rowley's skull right at the point here (pointing) where my nose is, upward to this area here where there was a group of comminuted depressed fractures, [37] ran back to the top of the skull and then crossed over to the left occipital area. This left occipital area is not evident on this film. I also saw it running there at the time of the operation.

This fracture that runs forward connects with the frontal sinus and connects with one of these air spaces that connects with the man's nose.

The Court: That is Exhibit No. 13.

Witness (continuing): That X-ray Exhibit No. 13 in the prior proceeding was taken on the 30th of July, 1946, some time before 10:20 a.m. I am speaking for both Exhibits 12 and 13. That is shown on the exhibit. Now, this view is taken with the X-rays passing from side to side and it shows this multitude of fractures actually down in the brain substance itself. This is a fragment of bone that is down in the brain substance. This is presumed to be the one I removed which was an inch and a quarter from the top of the skull.

The Court: I see a little mark——

Witness: That is the part of the fracture, and it—These two X-rays I had prior to performing the operation. There were no others available for my use at that time.

(Testimony of Howard G. Romig.)

(Witness is handed a number of photographs heretofore introduced in evidence, and continues as follows:)

Exhibit No. 119: This shows the hands of my assistant here exposing the comminuted fractured area in Mr. Rowley's skull. The black tissue here into which has been inserted a hemostat is brain tissue and blood. In this area there is no bone. These small fragments of bone have been removed. This large fragment and this fragment here were elevated and replaced; and in this area several of the small fragments were taken and cleaned up and placed there with the hope that they would grow and cover Mr. Rowley's brain. [38]

The Court: Is the brain tissue actually black in color or gray?

Witness: No, it is largely gray and white.

The Court: But it shows up black in the picture?

Witness: Yes, because on account of the presence of blood. Now, 115 is a similar exposure without the instrument being inserted in the brain tissue. 114 is likewise a similar exposure. 120 is a profile of Dr. Flora, and a front view of me for identification purposes at the operation, and this is a fragment of bone visible in the fractured area. This is a working picture that does not show very much. That is Exhibit 121, Dr. Flora and myself. 122 shows no detail of essential value. 123 shows the beginning of the closure of the wound. 118 shows the residual bone and fragments that were

(Testimony of Howard G. Romig.)

not placed back in the skull. These are fragments of bone and pieces of brain tissue.

The Court: What are the larger articles?

Witness: These are sponges of blood and brain tissue adhering to them. 117 is of no practical value. 116 shows my assistant with a piece of bone in his instrument that we were just removing from the brain.

Following the operation Mr. Rowley was given penicillin and sulpha medications for the purpose of preventing infection. In the course of his convalescence, in the first three days he was noticed to be blowing blood from his nose and excessive amount of nasal secretions. These undoubtedly reached his nostril through the sinus which was involved in the fracture. Subsequent X-rays in the course of his illness show an area of decreased density between his brain and the skull which is air, indicating that the air comes from the sinus; in other words, that the fracture communicates with an air space. [39]

The Court: Just a minute. You spoke of air between brain and skull. Between what part of his skull?

Witness: The fractured area and the tissue beneath it.

(Witness is handed Plaintiff's Exhibits 108 and 109.)

Witness (continuing): These are the 13th of August, 1946—this shows the comminuted area to

(Testimony of Howard G. Romig.)

be now moderately devoid of these fragments and in some measure covered over with fragments—for example, these two (pointing): The dark area represents no bone, that means there is no skull over the man's brain in this area. It is an area between the size of a quarter and the size of a 50-cent piece. That little white thing in the middle is a piece of bone placed there in the hope that it would grow on across. By area the size of a 25-cent or 50-cent piece, I mean the total of the uncovered area of brain.

Q. Will you trace the fracture on this photograph as of the 13th?

A. Yes (tracing)—then it disappears in this area because you don't see—you can see a little decreased density right here. By decreased density I mean there is relatively less brain tissue there—enough so it doesn't cast a shadow. That is here, here and here, and there wouldn't—certainly would not be a vacuum there, or the brain tissue would lie against the skull. Therefore, this decreased density can be nothing more than air, and air had to enter the cranial vault through the sinuses because the skin is closed so tight it could not get through there. The reason for mentioning air, communicating with the sinuses also indicates the possibility of infection. The sinus communicates with the nose. [40]

In the course of Mr. Rowley's recovery, in the first few days he complained of numbness and tingling in his left arm. Examination showed no positive findings so far as the arm was concerned. How-

(Testimony of Howard G. Romig.)

ever, considering the fact that he was injured on the right side of his brain, it was assumed that this was some disturbance as a result therefrom. His course in the hospital was very satisfactory—fever was never high and subsided in a few days.

The Court: Before passing that one point: What is the explanation of a numbness or tingling in his left arm when the right side of the brain was injured?

A. It is common knowledge that injuries to the right side of a man's brain will produce symptoms to the *right* side of his body. For instance: A stroke in the right side of the brain commonly has the left side of the body paralyzed.

Witness: I have taken X-rays regularly since the injury, and after the 13th of August.

(Witness is handed Exhibit 105 and asked to place it in the device and analyze it.)

Witness (continuing): This is a lateral view of Mr. Rowley's brain. It shows the presence of two fragments beneath his skull. Now, I have never been sure whether these fragments were left in his brain or whether that is on the other side of the mid-line and appears to lie in the brain tissue. Decreased density indicates the presence of air (witness indicates by pointing to place on photograph).

The Court: Could not that appearance come from the absence of bone?

Witness: Yes, sir.

Witness (continuing): This is Exhibit 113. It is a **[41]** stereoscopic film.

(Testimony of Howard G. Romig.)

These films are similar in that they are taken at a specified distance much the same as you would look at something with both your eyes, then by putting them in the stereoscope device it gives you a sense of depth. And in this fracture line seems to run into the posterior aspect of the skull—the left posterior part of the skull.

The references I have just made account for 112 and 113. Here are stereos of his skull—12th of September is a lateral film of the skull, and the controversial piece of bone that may or may not be in the brain substance as exhibited here. Altogether, this indicates a rather alignment of fragments. That is Exhibit 110. No air is seen in this.

On 9/12/46, Exhibit 111, this is taken from the back and this shows the—it shows the defects still in the man's skull and fragments in rather satisfactory position. This X-ray only shows the X-ray from the front from the top of his nose to the top of his head. It can be traced in this manner—down here (indicating). Those little pieces of floating bone in there have not materially changed since the X-ray that was taken on the 11th of August. There is nothing else noteworthy about this particular X-ray.

I would like to look at my record for just a moment. On the 21st of August Mr. Rowley went home, according to my notes. At that time I considered his progress in the hospital highly satisfactory as was also the judgment passed by one or two other doctors who had seen him once or twice in

(Testimony of Howard G. Romig.)

my absence. However, I noticed that Mr. Rowley's mental capacities have been dulled, and this has become increasingly more apparent in the past few weeks. At the present time Mr. Rowley complains of dizziness, [42] headache, ringing in his ears, a sensation of staggering or giddiness, inability to concentrate without a headache, inability to function mathematically almost totally at times, increased fatigability as far as work is concerned.

I took some more X-rays on the 11th of October. Analyzing these X-rays in this device, Nos. 102 and 103 are stereomats taken for the purpose of showing the occipital or posterior parietal fracture; that means the fracture in the back part of his skull. There is nothing of importance in those particular stereos.

Q. Will you trace the fracture?

A. Yes (tracing): In this position here, around over to here; it disappears here. This is the very base of his skull there; that is the back; he was laying on his back when that was taken, face up; skull was on the plate. This is 104. This is a lateral picture of Mr. Rowley's skull taken on the 11th of October, and without any doubt at all, and considering the fact that there is absence of bone in some part, there is evidence of air in this man's cranial vault. In other words, on that date his fracture area had communicated sufficiently with the sinus to show the presence of air.

Q. Will you show what demonstrates that?

(Testimony of Howard G. Romig.)

A. In this area here (indicating) and very nicely depressing the brain substance around to here. All that area of decreased density is too much to be accounted for by the defect in the bone itself.

Witness (continuing): Tissue casts a shadow on an X-ray film which is gray. The absence of tissue, such as here, is dark. In other words, this is the brain and bone here—is dense—and it is, therefore, gray on the film. There is nothing out here and it is black. This area of decreased density is air. It is not as dense at this part [43] of the film, nor yet as decreased as this part of the film where there is nothing.

Q. And, therefore, you conclude that that is air?

A. This film in particular, in case of controversy, I think it should be shown to other doctors. That is 104; 107 is the stereo on the 11th of October. This is a P.A. stereo, meaning to say that the X-rays passed from the back of the man's skull through to the front of his skull. The purpose of this was to show the extent of the fracture forward in the man's skull. Inasmuch as we cannot see these stereoscopically, it does, however, show the fracture communicating in the sinus, and if we had a stereoscopic viewing box here it would show this more clearly. That is 107 and 106.

There are some more X-rays taken as late as yesterday, including those two you have just given me; these represent each and every X-ray taken of Mr. Rowley. The films that I have seen today, to the best of my knowledge, represent all the films

(Testimony of Howard G. Romig.)

taken in this case. Those were both taken yesterday morning—they are numbers 100 and 101. The first film in the box is a lateral view of the man's skull; this is 101, and it shows two of the fragments depressed slightly below the general level of the internal table of bone. We refer to a skull as having two tables—an outer dense piece of bone and inner dense piece of bone. These fragments are below the inner table of bone. In other words, they are below this level of the skull, and being in this particular position and considering the fact that there is much scar tissue over the brain, they could be actually the cause in part of Mr. Rowley's present symptoms. Is that clear? These two pieces of bone, plus the scar tissue in his brain, are certainly a part of his present symptoms. The point in bringing this out is that [44] this may some time have to be rectified surgically. This 101, and it is dated 12/9/46.

Q. Will you trace that fracture again on this, please?

A. Here is part of it, and the fracture line is not visible here, excepting that this fragment of bone is depressed, and this piece of bone is below the internal table. That is on Exhibit 101. To prove that this one fragment is depressed in this view, the P.A.——

The Court: This is 102?

A. 100. To prove that one fracture without any question is depressed you can see where the fragment and the rest of the skull overlap one another. Standing back you can see that this is a little

(Testimony of Howard G. Romig.)

lighter. In other words, that small fragment—that small fragment is below the general level of his skull.

Many elements make up—help you arrive at a conclusion or a diagnosis. The first is the unsolicited symptoms given you by the patient; the second are your findings, and one of the most important things is the history of the case. In this particular case the history at this point consists of all I know about it, starting at the 30th of July and to the present date. Those would be my findings.

At the present moment I cannot recall that I have omitted anything. I wish to point out, however, that the man's injury was in the frontal part of his head and that he had a severe brain injury, and that the outcome, of course, is to be measured according to the knowledge that it was a severe injury to that part of his brain—the frontal part of his brain. I do not believe I have omitted any significant symptoms.

The prognosis is to be called the outlook in Mr. Rowley's case, what he can expect and how comfortable he [45] will be, or how uncomfortable he will be. My prognosis, in addition to being based upon my diagnosis, is in some measure based upon my recent study of Wechsler's Textbook of Neurology. I do not know who publishes that textbook. The book you hand me is a 1944 edition of Wechsler's Textbook of Neurology, published by W. B. Saunders & Co. My prognosis is based also on Attorneys Textbook of Medicine by Gray—1940 edi-

(Testimony of Howard G. Romig.)

tion, published by Matthew Bender and Company. Wechsler is an outstanding authority, and the other as I understand it is a medical testbook for attorneys. I have not been acquainted with it until a late date, but Wechsler I have been acquainted with for many years. I think this attorney's textbook of medicine came from the Judge's chambers. I read on the inner part of the cover, "Property of the United States for use of the District Judge." Based upon my diagnosis and study of the text you have mentioned, and my experience as a surgeon and physician, my prognosis in this particular case of Mr. Rowley is unfavorable. I mean that Mr. Rowley may have no end to his headaches, to his dizziness, to the ringing in his ears, to his nervousness, to his fatigability, and his nightmares and insomnia. He may have no end to those. They may, in fact, become worse. Not only could he have those complications, but epilepsy, for example, could ensue. Wechsler's Textbook places that at five and ten per cent up to thirty in severe injuries. By that I mean that the outcome of epilepsy depends in large measure upon the amount of brain tissue destroyed and the proximity of the damaged brain tissue to the motor centers. By Wechsler placing it at 10 to 30 per cent, they estimate that a man with a severe head injury has about a 10% chance of [46] becoming a confirmed epileptic, and in some types of injury, but not specifically the one involved, it is even known to be higher. Not only could he have that as a complication, but he could have, even at

(Testimony of Howard G. Romig.)

a late date, meningitis—inasmuch as it communicates with the sinus, he could even have a brain abscess. Mr. Rowley's condition is no better, in fact, since he left the hospital. It is also possible that Mr. Rowley could go through the remainder of his life without any epilepsy. When I speak of prognosis of epilepsy, and these various disorders I have described, I do not mean it is going to happen, but in my opinion Mr. Rowley will never be free of some measure of his present discomfort. Those discomforts that he suffers now are headaches, dizziness, ringing in the ears, nervouness, fatigability, sleeplessness, and he has the one positive finding of diminished cerebration. Mr. Rowley is not mentally as capable now as I have known him before. I would say I have known him eight years.

(Witness reads from Wechsler, page 538 of the 1944 edition, as follows:)

"Prognosis.—The prognosis varies with the severity and location of the injury to the brain. Immediate or early death occurs in a great many cases. The death rate is high in lesions in the neighborhood of the medulla and frontal lobes. Fracture through the frontal sinus may result in late meningitis. Generally, fractures of the base are more dangerous than those of the vault. Depressed and comminuted fractures offer a worse prognosis than simple fissured ones. Compound fractures carry the possibility of infection and subsequent meningitis or abscess. Loss of deep re-

(Testimony of Howard G. Romig.)

flexes, drop in blood pressure, and fixed, dilated pupils are of ominous significance. In general, fractures of the skull are not only [47] immediately serious, but may leave behind grave and permanent sequels. A great many patients never recover at all. Complete recovery and return to former occupations or previous intellectual vigor is not at all rare. However, recovery may take months or even years, and no definite prognosis can be ventured before all possibility of the occurrence of late complications has passed. Permanent deafness, facial paralysis, ocular palsy, and even optic atrophy may remain after fracture of the skull."

The lesion in this injury occurred in the frontal area, rather close in the motor cortex. That is back close to the mid portion of the brain. It roughly covers the frontal lobe. When they said the death rate is high in lesions in the neighborhood of the medulla and frontal lobes, they mean the same frontal lobes I am now speaking of. While the medulla and frontal lobes are separated considerably, lesions in that area, according to the text, are worse than other areas of the skull. I did point out the fracture in the frontal sinus to the Judge; that is the same frontal sinus that they refer to here when they say that "fracture through the frontal sinus may result in late meningitis." There was fracture of the vault of the skull. The fracture ran all the way from the frontal area to the posterior. He had a compound, comminuted, depressed frac-

(Testimony of Howard G. Romig.)

ture of the skull. Also he had linear fracture reaching from the front of his skull to the back of his skull.

This is page 254 and 255, and I think, with the permission of the Judge, I would like to just brief this because it is a little boring to read the whole thing. From these pages I glean the following facts: That after an injury of this type headache follows in 67 per cent of [48] the cases. This is intractable in some cases. Also dizziness, ringing of the ears, optic nerve injury, deafness, nervousness, fatigability, insomnia—the percentages are as follows: Dizziness, 60 per cent; ringing of the ears, 9 per cent; optic nerve atrophy, 19 per cent; deafness, 11 per cent; nervousness, 20 per cent; fatigability, 13 per cent; insomnia, 7 per cent. In other words, according to these percentage figures, considering Mr. Rowley's injury, he has a great likelihood of never ever being free of any one of these miserable symptoms. He has at the present time headache, dizziness, ringing of the ears, nervousness, fatigability, and insomnia. I would like to add, furthermore, that I have never solicited, or made a leading question of Mr. Rowley of all these symptoms he has given to me without me asking for them. From my observation—diagnosis—of Mr. Rowley, he has had as many as three to five headaches in a day, precipitated in some degree from concentration or nervousness. He has been free for never more than two days of headache, according to his story. I did not ascertain the number of times he became dizzy,

(Testimony of Howard G. Romig.)

but I assumed that it more or less paralleled his headaches. His symptoms of staggering occur rather rarely. Nervousness is a constant feature of his present personality, and I would like to say that Mr. Rowley has always been rather phlegmatic, stolid, and composed in his nature as long as I have known him. There is no other authority I would care to read to the Court in connection with my prognosis. In my opinion, based upon my diagnosis, he could not return to regular work at this time. I cannot say when he would be able to return to his regular work. Mr. Rowley has a chance of never being able to hold down a regular job. Based upon my diagnosis of Frank Rowley, he can "work at all" at the [49] present time. I have told him to do it. It is part of his treatment, and it is very necessary to his recovery. At the very time he left the hospital I told him to move about moderately and increase the amount of exercise and begin gradually to work. I meant work in some measure in the lines of his electrical work—something to do with the project he has in Mountainview, for example. The amount or quantity of work he was to do was more or less up to Mr. Rowley than to me. I mean according to his ability to tolerate work. By that I mean he was to work until he got tired, and to avoid working thereafter if he got too tired. I mean Mr. Rowley cannot hold a job in my opinion. I do not know that he will ever be able to hold a job. However, I would not be surprised if he could. The outlook as far as that is concerned is rather indefinite.

(Testimony of Howard G. Romig.)

As to future medical treatment, I think Mr. Rowley should seek the services of a specialist. I think it should be at any recognized medical center, preferably Mayo's. A round trip to Mayo's would cost $400.00. The cost of this specialized medical service at Mayo Brothers would depend in some measure on what they would decide to do. It is altogether likely in Mr. Rowley's case he will be obliged to have his skull re-opened, scar tissue removed from his brain, any other piece of bone remaining within the brain substance would be removed. The delicacy and finesse of that operation is beyond me, at least locally. As to the cost of the examination alone I think the time consumed in being there, going through the clinic, is based, as I very well know, on a man's ability to pay, but it would certainly run, just for the examination alone and the time consumed, I would say $1,000.00. [50]

Any other services that might be performed—for instance, if a piece of bone had to be taken out of his skull box would indeed cost him additional. I would like to point out, too: I expect Mr. Rowley to be in the hands of a physician for a long time on account of his present difficulty. By a long time I mean—well, it is indefinite, but I would say no man with this significant head injury could ever hope to escape a doctor's care for years and years.

In all the time that I have seen Frank Rowley I have never in my life noticed any evidences of malingering. Never.

(Testimony of Howard G. Romig.)

I am going to ask for $750.00 for my services that I have performed to date on Mr. Rowley. I do not feel a doctor should necessarily have to itemize all of his work. I feel that that is a fair fee. I believe I saved Mr. Rowley's life.

Q. Why did you ask for $2500 at one time?

A. Well, that was—I might have done hastily, and at the same time I considered the possibility of further medical consultation and work.

Cross-Examination

By Mr. Cuddy:

I do not know how long it took to perform this operation. I would guess three hours. I have performed three operations of this nature—two of those three have been in Anchorage. I do not mind stating who they were. Let me see—of course, the outcome of the case was unfavorable; the man died. His name—Dr. Walkowski helped me. He might even tell me the name. That was eight—nine years ago. I have not performed an operation of this sort for eight or nine years. These are not common operations. [51]

I testified that there are two depressed points in Mr. Rowley's head; two pieces of bone below the inner level of the skull. I testified that I removed one piece of bone at the depth of one and one-quarter inches; it was pressed into his brain tissue at a point which was an inch and a quarter from the outer table of bone. I approximated it. I stated that I put some bone tissue over his depressed area,

(Testimony of Howard G. Romig.)
hoping that it would grow or enlarge. It takes four months for that to be accomplished, to be conclusive—four months, five months. The area that was denuded of bone is not covered at the present time. Those which are present in yesterday's X-rays, I feel, are sustained by circulation, and are alive, but I doubt that they will ever cover the denuded area. It is my guess, or my thought in the matter that they will not grow to cover the whole area. I do not think I could be incorrect in that, and that they could grow and cover the whole area. I do not think it is possible.

I do not have any air in my brain at that point, or in that space—none at all. That in itself is not an unhealthy condition. Commonly doctors introduce air into the brain for purpose of diagnosis, but in this case Mr. Rowley has air introduced into his brain there and it cannot come from but one place, and that is the sinus. His fractured area communicates with his sinus and his nose is full of bacteria and, therefore, he could get, as I say, a late meningitis. That is all, except if there was a large amount of air it could depress the brain tissue. There is enough there to make a diagnosis of air. It is small, but the significance is not the amount of air; it is the fact that it has to come from the sinus which is obviously contaminated with bacteria. [52]

They pump air into the brain by putting a needle into a man's spinal canal. You can put it also into the brain itself, and they do. But the most common procedure is to put it into the spinal canal. That is called an encephalogram.

(Testimony of Howard G. Romig.)

Q. On the air there: That, as you interpret by the X-rays, is air. If there was air there would not it be indicated by a certain—well, say, discharges or some such item as that?

A. You mean from—discharges from where?

Q. The nostril?

A. Indeed, and he did pass blood, and a moderately increased amount of fluid from his nose, following the injury; but he does not now, not that I know of.

Q. Do you consider that serious, Doctor, at all?

A. Just of passing significance. I mean to point it out as one of the many possible complications in Mr. Rowley's case. As to its being very positive, or on the extremely indefinite side, I will leave that up to you with the other doctors. To my way of thinking, it is positive. I want this to be brought out to the presence of the Court, that the air is far from the most important thing in Mr. Rowley's case. He has brain damage; he has undoubtedly got scar, and this presence of air is just one of the many things that can be measured as a complicating feature to the case. At the present time there are no outward indications—excepting as I interpret the pictures of the X-rays that there is air there.

Q. And it is causing him no difficulty that you know of at the present time?

A. Now that is far from right. It could be in a large measure responsible for his headaches, dizziness, ringing of the ears, staggering—any of the rest of his symptoms. [53]

(Testimony of Howard G. Romig.)

Q. Does he stagger?

A. No; he feels he is going to stagger, which is enough; if you feel that unsteady you do not walk well. He demonstrated for the doctors yesterday that he could walk well and he did not stagger. He did rather well. He did not run up and down stairs. He did not travel fast. He traveled slower than normally. I believe I have known him for about eight years. I have treated him before. I think he was at the Providence Hospital—I do not know—worked there—I don't recall that I treated him while he was there. He has never had any other injury of significance so far as I know. Of course he has lost his eye. He has scar on his scalp; but they were not of significance as far as this case is concerned. There has not been a fracture before that I know of. There could be. There is a scar on his scalp. You can see it if you look at it. I believe I asked him about it when I was studying his case. The answer was insignificant. I cannot recall what it was. I don't place any importance on it. I do not know whether it was a fracture. Yes, he is of a phlegmatic type. He is a skilled tradesman so far as I know. I don't know about his early schooling. I know that he went to a trade school early or late in his life. I do not know whether he completed the fourth grade, or the eighth grade or twelfth grade. He is slow in his manner of address —as I said, stolid and phlegmatic. A Texan who drawls is not necessarily slow, you know. He could be quick.

(Testimony of Howard G. Romig.)

Q. Would you say that this case—the trial of this case, and the incidents thereto might not have a—some action upon him?

A. You mean to infer that he is a malingerer?

Q. Not exactly that, sir.

A. Do you mean to infer that, Mr. Cuddy: I can answer it if you do. [54]

Q. But perhaps the worry of the outcome of this case has an effect upon his life, or his thought?

A. You mean this case?

Q. Yes, sir?

A. The thing of paramount importance to Mr. Rowley is his ability——

Q. Wait a minute—just answer that question.

A. I will have to ask you to re-state it, then.

Q. Does not the trial of this case, perchance, have an effect upon his actions?

A. Certainly, it would make a man nervous. But right here I wish to take exception to any inference that the man is a malingerer, if that is what you wish to bring out.

Q. I didn't——

A. Well, you said maybe—is that what you mean? Do you? Answer the question.

Q. No, you finally answered the question.

A. I just want to be sure what you mean.

Q. Just the matter of fees, Doctor: The fees that have been set by the Alaska Railroad as fair fees, are they approximately along this line?

A. The Alaska Railroad fees are archaic in the actual sense of the word. Those were made before

(Testimony of Howard G. Romig.)

1930. In fact I would not be surprised if they were written in 1918. I believe a craniotomy in that scale is $400.00; I don't know, but I believe that—I had one of those schedules a long while ago. But my fee in this case is $750.00. I believe I saved Mr. Rowley's life.

Witness (Continuing): It is my belief; it is absolutely my opinion that the man will require medical treatment for some time to come.

Q. Although, as a matter of fact, it might be that on the conclusion of this case the man would rapidly regain his normal condition?

A. Mr. Cuddy, you are inferring he is a malingerer, and I say he is not. [55]

Mr. Grigsby: We object to this statement of the witness. There was no such inference.

The Court: Answer the question, Doctor.

Witness: Do I believe he could get well right after this case?

Mr. Cuddy: Yes?

A. No, I don't think he could get well right after this case.

No, I don't believe there is a direct connection of air now in that space that I have testified about, and the nostrils or the sinus.

Q. Is that air that was left there at the operation? A. No, sir.

Q. That has got in since? A. Yes, sir.

Q. How did it get in?

A. I think through the sinus. That is the only way it could get in there.

(Testimony of Howard G. Romig.)

Q. Now, that's what I wanted to know, Doctor. Is there a connection between the sinus and that cavity where there is air?

A. I said I did not think there was now. The fracture runs down the region of the sinus.

Q. Well, can air get in?

A. Sure, you can blow your nose and back air up into your brain now, if something were just a little bit wrong with it.

Q. Might there be that in my brain now?

A. I don't know, Mr. Cuddy.

Q. If no more got in, would the air absorb?

A. Certainly.

Q. Well, if you don't believe there is any air getting in there now, what is there would eventually be absorbed? A. That is right.

And thereupon

DR. A. S. WALKOWSKI

called on behalf of the Plaintiff, being first duly sworn, testified as follows: [56]

Direct Examination

By Mr. John Hellenthal:

I graduated from the University of Michigan Medical School in 1927. I interned at St. Vincent's Hospital, Toledo, Ohio, for one year; worked as a physician and surgeon for the Kennecott Copper Corporation up to 1930; from 1930 to 1937 I was railroad surgeon for the Alaska Railroad, at

(Testimony of Dr. A. S. Walkowski.)

Anchorage; and since then I have been in private practice until 1943. In July of that year I entered the Naval Service and was released from active duty on December 16th. I returned to Anchorage in February of 1946 and have been here since. I am a practicing physician and surgeon at the Providence Hospital. I am President of the hospital association or staff of doctors. I was appointed by order of this Court yesterday to examine Frank Rowley and I did so.

The diagnosis is based upon all the information that you can get from the patient or from any other source. That would be the verbal statement of the patient, or any other reliable source—friends, or parents, guardians—and then the findings upon physical examination enter into the final conclusion, and—symptoms enter into that diagnosis also. My diagnosis of Frank Rowley's case is that he sustained a fracture of the skull, the characteristics of which have been described by Dr. Romig. He sustained a tear of the fibrous covering of the brain, and also sustained damage and loss of brain tissue in the right frontal lobe as described by Dr. Romig. Those things I did not see. Since then he has been operated upon and been up and around. We pass on to the statements as made by Mr. Rowley as to his feeling, his sensations, and his general well being, or lack of it as you might add. In addition to [57] that there is evidence submitted by X-ray examinations at the hospital, and interpretations of those X-rays regarding his injury. I do not know whether

(Testimony of Dr. A. S. Walkowski.)

I saw all of the X-rays that the hospital had of Mr. Rowley. I think we may have seen six or eight. Based upon my diagnosis my prognosis will have to be necessarily guarded. I have not had the opportunity to observe Mr. Rowley a sufficiently long time to give as complete a prognosis as probably I should. A prognosis depends upon a little longer observation in this type of a case than I have been afforded.

Q. If Mr. Frank Rowley suffered an injury to his frontal sinus, such as I have described, what would be your prognosis, based upon the occurrence of that injury alone?

A. You mean the injury to the frontal sinus, not the frontal lobe?

Q. The frontal lobe of the brain?

A. There are very many factors that would enter into any complete statement that probably should be made in this case. That's what you have reference to—in this particular case?

Q. Just say, isolated injury to the frontal lobe of the brain, what would be the prognosis in a case of that sort?

The Court: I think it ought to be brought down to the instant case. The doctor has made some examination of the plaintiff and has seen the pictures and his conclusions——

Mr. Hellenthal: What would your prognosis be relative to epilepsy in the future in this case, based upon your observation of the wound and of the X-

(Testimony of Dr. A. S. Walkowski.)
rays and of the symptoms and the findings brought out at the examination yesterday?

A. Before I would answer that question I would like to ask Dr. Romig a question, if I may.

The Court: You may. [58]

Witness: Was the dura sewed completely?

Dr. Romig: I sewed it completely with four silk, interrupted sutures.

Witness: And do you believe that the dura has held completely with no opening in it so the brain would protrude?

Dr. Romig: I believe the dura has contained the brain and there isn't anything that would come out through the dura.

Witness: Now I see. Now, would you ask the question again?

Court: The question was the possibility, or probability of epilepsy.

Mr. Hellenthal: Based upon the diagnosis of this case.

Witness: There may be a possibility. The X-rays do show some overlapping of the bone fragments, and this would indicate a possible pressure on the brain at that point. I do not believe there are any more bone fragments in the brain substance now.

Witness (Continuing): I observed no symptoms of epilepsy yesterday. Dizziness would not always be a symptom. Headaches are a symptom of epilepsy, yes. It is very difficult to say how long Mr. Rowley will have these symptoms. I believe

(Testimony of Dr. A. S. Walkowski.)

I am not in a position to make any positive statement as to a prognosis based upon my observation and all, as to late meningitis. It is entirely possible that the fracture that is into the sinus does not necessarily mean that the sinus itself had been opened—that is, the lining of the sinus—so that air could get into it. However, there is that possibility, but we do not—in my opinion—I have no proof, but, however, there is that distinct possibility.

Q. Of late meningitis?

A. No, air getting into this part of the cranial vault. [59]

What would happen if it did, would depend upon the rate at which the air entered the cranial vault. That is what I am trying to explain. It would depend upon the rate at which the air entered the cranial vault. It would depend upon the amount and it would depend upon the location of the brain that the air surrounded or pressed down on. The result would depend upon all these factors. If there was a small amount of air in a relatively non-vital spot, like a medula, he probably would have no symptoms. If there was a large amount of air entered in at a rapid rate, the result would be more serious. Infection could be introduced at that time. Compression of the brain could result, which would give him very serious symptoms—might even cause death. My prognosis of continued headache in this case is that headaches can very well continue. For what length of time I would not be able to say. We do know that headaches do sometimes continue over

(Testimony of Dr. A. S. Walkowski.)

a rather long period of time. In that I mean years. I do not know what the possibilities are of dizziness continuing. It is possible the dizziness may continue. It may not. It is very impossible to say how long the dizziness could continue. It could continue for years. Dizziness and vertigo are practically synonymous. The possibility of blindness would depend greatly upon the appearance of complications, like infection or abscess formation or some other such complication. I could not say what are the possibilities of insanity.

The kind of fracture Mr. Rowley suffered was a compound, comminuted, depressed fracture of the right side of the skull in the frontal parietal area. There was also a continuation of the fracture forward into the frontal sinus and backward across the vault of the skull toward the left side. [60]

From my observation of Mr. Rowley I think his arithmetic and mental processes were retarded and confused. I think that he suffered a severe brain injury. In my opinion, based upon my observations, I believe that the loss of two-thirds of an ounce of brain tissue from the frontal lobe of the brain, as described by Dr. Romig, could result in personality changes. And also it could not. It could result in the present symptoms that Mr. Rowley shows. I think that if symptoms continue it may be necessary for Mr. Rowley to have the scar tissue removed from his brain, and perhaps the fragments below the level of his skull removed. It will depend upon the findings and the way Mr. Rowley feels. I think that

(Testimony of Dr. A. S. Walkowski.)

should be done if the present symptoms persist. I did say that I did not know when his symptoms would stop—whether it would be next week, next month, or a year from now.

From the history of this injury as has been described to me at the Board meeting from the operative findings, from the post-operative course followed in this matter, and from the present symptoms of the patient, and from my observation of the X-rays, and from my personal observation of the patient himself, I have no reason to believe that Frank Rowley is a malingerer.

Cross-Examination

By Mr. Grigsby:

The symptoms just referred to, such as headaches, dizziness, and ringing in the ears, are the ones described by the patient, and are called subjective symptoms. They can be judged only by the story of the patient himself. Unless there is some other nerve test made and close observation, we just take the word of the patient.

Q. Now, could those symptoms be aggravated or accentuated [61] on account of—not intentionally—I did not mean malingering—but on account of the anticipation of the trial, and the thinking about it and the ordeal of the whole affair, would that tend in any degree to accentuate or aggravate those symptoms? A. Yes, it might.

Q. Without any intention on the part of the patient? A. Yes, sir.

(Testimony of Dr. A. S. Walkowski.)

Q. Now, did you say, from your observations of the X-ray whether or not you could tell there was any quantity of air in the brain now, such as Dr. Romig described?

A. That is very much a matter of opinion. There may be air; there may not. The X-ray shows a loss of substance. Now whether it is air or not, or simply dark area in that X-ray due to loss of substance, I do not know.

Q. And that could not be definitely and positively stated from the X-rays?

A. I could not say so. My opinion is that I cannot say that it is all air.

Q. And could you say that positively—that any of it is air? A. No, sir, I cannot.

This fracture originally extended to the sinus.

Q. And at that time could air have penetrated the brain through the sinus from the nostrils? At the time of the injury could it have penetrated?

A. There is air in the sinus all the time.

Q. Yes, and could it get through the fracture into the brain?

A. The question is as to whether a fracture in the bone had continued on into the tissue lining around the sinus and opened it that way and allowed air to get into the cranial cavity?

Q. Well, if that condition existed today, so that air could today get into the brain from the sinus, would there be symptoms of it? Such as a discharge or a feeling of a sensation of bubbling that the patient would experience? [62]

(Testimony of Dr. A. S. Walkowski.)

A. If the cranial cavity and the sinus were continuous—that is, if there was still an opening—there is every likelihood that there would be cerebral spinal fluid being discharged through the nose.

Q. Were any tests made of Mr. Rowley in that regard to see whether such a condition existed in the hospital last night?

A. Yes, he was asked to blow his nostrils.

Q. And did it result in any abnormal secretion?

A. I don't think so.

Witness (Continuing): There were some physical tests made up there, yes, sir, during the examination. He was asked to walk and to manipulate his fingers; to squeeze the examiner's hands. His reflexes were tested; balancing tests were made, and he was required to state—or answer questions regarding recent and past events to test his memory; questions were asked him—mathematical problems, simple mathematical problems, to see how quickly and how accurately he could solve them. His one eye was examined; his ears were looked into and also his nostrils. I didn't examine his heart and lungs. His pulse was taken, and his blood pressure. His blood pressure was high—elevated. I thought his equilibrium was normal. He was asked to walk up and down stairs. That is part of the test of balance. I thought that was normal. I spoke of his grip, or strength of his arms being tested. I thought that his contraction was equal on both sides. I would say he was a normally strong man at the present time with respect to his arms

(Testimony of Dr. A. S. Walkowski.)

and shoulders, and legs. I heard Dr. Romig's testimony with reference to the advisability of his working within his capacity, as a help to him. I agree with that. I think that Mr. Rowley would be benefited by occupying himself with some work up to the limit of his capacity. I think the trade of [63] winding motors is completing the armature of the rotary part of an electric motor and the stationary magnets. How heavy that work is depends upon the size of the motor. It is a very difficult statement for me to make as to my opinion of Mr. Rowley's ability right now or in the near future to engage in that work. I do not think I am in a position to state unqualifiedly just what he would be able to do. That is purely a subjective reply, or condition, that Mr. Rowley would have to give me in order to form any opinion. I do not have any tests that I could make which would either support or refute any statement that he would make, because he says that work and concentration give him headaches. Headaches frequently follow skull fractures, and there are headaches from a great many other causes, yes, sir. Spells of dizziness follow a skull fracture frequently. Mr. Rowley did, in answer to questions, say that he suffered from dizziness to some extent, and also had some ringing of the ears and headaches. He did not show any symptoms of dizziness in going through physical tests that he was put through up there yesterday.

Q. Did he go through some tests which are known as aviation tests?

A. Coordination tests?

(Testimony of Dr. A. S. Walkowski.)

Q. Yes, standing on one leg? A. Yes, sir.

Q. For a certain length of time?

A. That is right.

Q. And on both feet with eyes shut?

A. Yes.

Q. And on one leg with the other one upraised?

A. Yes, sir.

Q. And that was applied to both legs?

A. Yes, sir.

Q. Did he pass very good tests in that respect?

Mr. Hellenthal: Just a minute. I object to the form of that.

The Court: Overruled. You may answer. [64]

Witness: I thought his response to those tests was within normal limits.

Mr. Grigsby: In other words, presently, physically he is in pretty good condition, is not that right? A. He seems to be, yes.

Q. From your observation of Mr. Rowley and what you have learned from the X-ray photographs, and also from his answers and the whole examination, would you advise an immediate trip to Mayo Bros. or some other institution for further examination, or would you consider it advisable for him to try out his usual and ordinary occupation? I mean right now? Or could you answer the question with the information you have?

A. I think Mr. Rowley should be given a chance to try his occupation to see whether he can or not maintain that type of employment.

(Testimony of Dr. A. S. Walkowski.)

Q. If he could stand a reasonable amount of that type of employment, and without undue fatigue or bad results, would so doing be calculated to improve his condition? A. It might.

Q. Now, Doctor, if, on the other hand, the course pursued with reference to Mr. Rowley would result in continued examinations and photographing and consultations as to symptoms, and those things which, to a certain extent, have been testified to as having been going on for the last few months, would that course have a tendency to accentuate his symptoms and, to a certain extent, postpone his recovery—having this on his mind and unsettled?

A. Well, an unreasonable amount or an unnecessary amount might do that, but I am of the opinion that these things will be done on the basis of symptoms that he will present. [65]

Q. They will be done in what we would say in common parlance, a workmanlike manner—a reasonable way?

A. Yes, sir. If he persisted in having symptoms, further examinations and further X-rays would be justified and they should be done.

Q. Also undue further examinations and photograps and things of that kind might tend to accentuate the symptoms, if it is overdone?

A. It conceivably might, yes, sir.

Q. Is that what you call developing neurosis, or some such word as that?

A. Well, there is such a word used.

(Testimony of Dr. A. S. Walkowski.)

Q. Well, Doctor, you are familiar with the old story about when a woman, or anybody else, reads of a patent medicine ad which asks a lot of questions—"do you suffer from dizzy spells?" and "have you" this and that—that a person can imagine they have all of them? Do you understand what I mean? A. Yes, sir.

Q. Now, a continual dwelling on a physical condition by the patient, and continual examinations, will have a certain effect along that line, won't it, on the patient himself?

A. It is very likely to.

Q. In other words, Mr. Rowley would be better off right now if the matter of this law suit was over and off his mind—he would be in a better position to recover? A. Well, he conceivably might be.

Witness (continuing): Mr. Rowley said that he had gained weight lately; that he was overweight now. I think he said his appetite was good. My impressions were that his appetite was not adversely affected.

The Court: What is the function of the part of the brain which in Mr. Rowley's case was injured?

Witness: It is reputed to be associated with higher thought, memory, the thinking processes, what we normally call thinking processes—association of ideas. [66]

The Court: Well, is it generally thought that an injury to one man's brain may result in suffering, or even death, and a similar injury, or substan-

(Testimony of Dr. A. S. Walkowski.)

tially the same injury, to another man's brain may not result in any such serious condition? What is the general opinion of your profession on that, do you know?

Witness: Well, in some cases the part of the frontal lobe is removed, for instance brain tumors.

The Court: Insanity, you mean?

Witness: There have been cases recorded in which personality changes have evolved from operating on the frontal lobe of the brain, yes, sir.

The Court: Well, is it or is it not true, Doctor, that in the vast majority of the cases such injury to the brain as was suffered by Mr. Rowley results in a decided shortening of the injured man's life and in general physical deterioration of one kind or another?

Witness: I don't know definitely as to whether it would shorten a man's life or not. The personality change that would occur, if any, would depend upon the individual.

The Court: It couldn't be certainly forecast—mathematically forecast—for either one of them?

Witness: No, sir.

Mr. Grigsby: Doctor, there are a great many possibilities and probabilities which cannot be stated within any degree of definiteness, is that about the situation? A. Yes, sir.

And thereupon,

DR. RAYMOND B. COFFIN

being first duly sworn, testified for and in behalf of the plaintiff as follows: [67]

Direct Examination

By Mr. John Hellenthal:

My name is Raymond Benjamin Coffin. I am a physician and surgeon. I graduated Boston University School of Medicine 1935; interned at the Binghampton City Hospital, Binghampton, New York, 1935 to '37; general practice and surgery in Southwest Harbor, Maine, 1937 to '42, and member of the medical surgical staff of Bar Harbor Hospital; in United States Navy 1942 to February, 1944; United States Marine Corps from '44 to January, '46; continuous practice in Anchorage since April, 1946. I have been engaged in general practice and general surgery. I have had considerable experience with regard to compound or comminuted or depressed fractures of the skull. I examined Mr. Frank Rowley briefly the morning of the injury, also at the Providence Hospital yesterday. On the morning of the injury I saw him at Providence Hospital on the operating floor. He had just been brought to the operating floor in a wheel chair. He had a laceration of his scalp with brain tissue protruding through the scalp wound, and with the help of a nurse we were shaving the hair and preparing the wound. My description of that laceration of the scalp would be very approximate since I did not follow the case. I would judge it to be approxi-

(Testimony of Dr. Raymond B. Coffin.)
mately three inches (3″) long on the right frontal area of the scalp. There was brain tissue protruding from that laceration. You could see it protruding through the scalp wound. The only other contact I had with Mr. Rowley was the examination at Providence Hospital yesterday afternoon. My observations on that examination were that Mr. Rowley, on objective findings showed some apparent clumsiness of physical and mental activity; he had no paralysis or total loss of reflexes; he complained of subjective symptoms which consisted of headache and dizziness, ringing [68] of the ears, sense of unsteadiness, particularly pronounced on exertion, either mental or physical. I studied the operative findings and the post-operative course followed in the treatment of Mr. Rowley at the meeting yesterday. The diagnosis is a post-traumatic fracture of the skull and laceration of the brain tissue with residual symptoms consisting of hypertension, high blood pressure and an impairment of mental and physical efficiency. I would believe the prognosis as to life is good, but prognosis as to full recovery of complete mental, emotional and physical efficiency would be rather poor. If I were Frank Rowley's physician, based upon the diagnosis I have referred to, and the prognosis just mentioned I would counsel him to follow further specialized medical treatment. I would not recommend that Frank Rowley assume any regular work at the present time. I believe he should attempt to work though at the present time. The conditions

(Testimony of Dr. Raymond B. Coffin.)

or the controlling factors in that attempt should be chiefly, his ability to do such work without causing severe headache, or any great exaggeration of his symptoms of dizziness and sense of unsteadiness. It would have to be left to his discretion.

The fracture I observed on Mr. Rowley's head is commonly described as a compound, comminuted, depressed fracture. I would have no opinion as to a specified time when Mr. Rowley's symptoms will stop. I believe that it would be longer than a month. It could very easily be a year; it is possible it might be five years from now. It is slightly possible it might be ten years from now. Under certain conditions they could become aggravated and more persistent and continued than they are at the present time. It could happen at any time. It could happen a year from now. It could happen five years from now, possibly ten years. I [69] would have no opinion as to happening twenty years from now. That is too distant to have an opinion.

Q. Now, doctor, in your opinion, based upon your observations, your complete observations of Mr. Rowley that you have already described, do you think the loss of two-thirds of an ounce by volume of brain tissue from the frontal lobe of a brain could result in personality changes?

A. I cannot answer the question exactly that way. I mean by that, whether it is the loss of brain tissue or the scarring and damage suffered to the brain. The type of injury he has, yes, yes, could result in personality changes.

(Testimony of Dr. Raymond B. Coffin.)

Q. Do you think that some time in the future that a man suffering from that type of injury should have the brain scar removed, or might be forced to have it removed. By brain scar I mean brain scarred tissue.

A. Well, I think it's—my opinion would be that it is unlikely that it would be removed. It might possibly need to be freed from the skull, if it becomes attached—adherent—but it is not common practice to remove those scarred areas. It is possible that a man suffering from that same type of injury might have to have the fragments of skull beneath the level of his skull removed from his brain at some time in the future, if they produce pressure symptoms. It's a possibility that might have to be done if the present symptoms persist.

Based upon my knowledge of the history of this injury, of the operative findings, of the post-operative course followed in the treatment of this injury, based upon the present symptoms of the patient and from my observations of the patient himself and of the X-rays, I do not think that Frank Rowley is a malingerer. [70]

The Court: Does any scar tissue form on the brain tissue itself from the brain tissue? Or is the scar tissue you mention the scar tissue of the dura?

A. Your Honor, there would be a scar formed at the site of the closure of the dura. There would also be a scar formed on the surface of the brain that has been injured, and the two might become attached—the two scarred areas might heal to-

(Testimony of Dr. Raymond B. Coffin.)

gether, or even heal to the fractured surface of the skull. That would be deleterious, hurtful; that would be more likely to produce symptoms than if they did not heal together. It is the usual cause of the epileptic form of seizures that these skull injuries—concussions—have.

It would be very possible to perform another operation on Mr. Rowley's skull at the site of the injury and not have scar tissue resulting from that operation.

Cross-Examination

By Mr. Grigsby:

I do not mean to imply that I am a specialist with cases of this kind, but I have on different occasions seen a considerable number of these cases—observed them. I have performed similar operations, probably—possible ten or a dozen or so.

Q. Doctor, with respect to these physical tests that this man was put through yesterday—for instance, as to what is called equilibrium tests for aviators—how did he respond to those?

A. He did very well.

Q. And walking up and down stairs?

A. It was good. His balance was good.

Q. Did you find him—did you test his strength?

A. Yes, sir, it was good.

Q. Is he strong? A. Yes. [71]

He is not markedly deteriorated in physical strength. It is reported by himself and his physician that he has gained weight. I tested his grip,

(Testimony of Dr. Raymond B. Coffin.)
his reflexes, and the strength of his arm. He was asked to stand on one leg with his eyes shut, and then on the other. He responded to those tests.

He complained of dizziness, headaches, and ringing of the ears at intervals. Those are symptoms that very frequently, commonly, follow a skull fracture. It is possible that according to recovery or not they pass off or get worse, that they might pass off and discontinue or they might become worse. I could not say positively, no, sir, from the limited examination that I have had the chance to make, right now, whether this man will improve or won't improve.

He should engage in a light—some light and pleasant type of occupation. I am not enough familiar with his past occupation to know the conditions of it, but it is largely a matter of training—re-training, and he should engage in some type of occupation within his capabilities.

And thereupon,

DR. GEORGE G. DAVIS

being first duly sworn, testified for and on behalf of the defendant, as follows:

Direct Examination

By Mr. John Hellenthal:

My name is George Gilbert Davis. I have practiced surgery as a specialty until I came to Alaska. I am a member of the American Board of Surgery,

(Testimony of Dr. George G. Davis.)
Western Surgical Association, American College of Surgeons, Chicago Surgical Society, and the American Association for the Surgery of Trauma—which means injury. I have taught surgery in Rush Medical College since 1907, until I came to Alaska in 1943, carrying out each [72] step by step from the lowest grade of instructor to associate professor of surgery at the time I left Chicago. I was graduated from Rush Medical College in 1904. Served in internship in surgery with Professor Nicholas Senn, and internal medical internship with Professor Sippy, gastro-intestinal diseases.

After finishing internship, I went for post graduate study in Vienna in 1906; studied the entire year of 1906 in the University of Vienna in general diagnosis. First of the year 1907 I went up to Berlin and entered the University of Berlin. Studied with the University of Berlin Hospitals until June, 1907. In 1907 I was associated with Professor Bevan, who was the head professor of surgery at Rush Medical College, teaching and practicing surgery at the same time. I continued that from 1907 until 1913 when I went for the government to the Philippine Islands as associate professor of surgery at the University of the Philippines and surgeon at the Philippines General Hospital.

In 1914 war was on and I was anxious to get into it so I resigned and took a commission with the British Army as honorary Lt. Colonel in the Royal Army Medical Corps and stayed with them for two years in a 1040-bed hospital. I returned to Chicago

(Testimony of Dr. George G. Davis.)
after the war. After two years with the British we went into the war and I went into training camp the first of June, 1917, organized Evacuation Hospital No. 1 and took it over to France as a surgeon. I stayed with our troops, first doing work in Evacuation Hospital No. 1 and doing surgery—Chief of Staff of that hospital—surgical staff—and then when the fighting began in June, 1918, I had what is spoken of as a casual surgical team. I took them around the different fronts in five major engagements. At the time of the armistice I was made surgical consultant for the Third Army and had charge of [73] the operative work of the Army of Occupation in Germany and Luxembourg.

I returned to Chicago in 1919, about September. At this time I continued my work with the teaching. I also took the examination for Cook County Hospital Surgical Staff and continued my work on the surgical staff at County Hospital from 1919 until I came up here in 1943. From the year 1919 until 1937 I was Chief Surgeon for the United States Steel Corporation, and in the Chicago District, of which there were about twelve different subsidiary companies, namely, the Illinois Steel, the American Sheet and Tin Plate, the American Bridge, Chicago, Joliet and Eastern Railroad, Universal Portland Cement, and others. I continued with the corporation until '37 when I resigned. I continued my Cook County Hospital work until the day I left Chicago, teaching surgery at the Cook County Hospital mostly.

(Testimony of Dr. George G. Davis.)

Since arriving in Alaska I have been in general practice. When I came up here I took over the position of Chief of Staff at the Alaska Railroad Base Hospital at Anchorage, which was surgery plus general medical work. I have done practically all type of general work up here, internal medicine, obstetrics—during my whole life I never practiced anything but surgery, up until the time I came up here. I am a general surgeon. I have had considerable experience with brain fractures both in the practical sense and in the academic.

I have made a diagnosis of Mr. Frank Rowley. I made that yesterday. That was not the first contact I had with Mr. Rowley. My first contact was the day he was injured. On that day I noticed he had a laceration about three inches long of the right frontal region, and that brain material was escaping. I looked at it. That is all I did. I saw laceration [74] of the scalp and that there was brain material escaping from the wound, and I could also see that there was a depressed fracture. You could see the continuity at the site of the laceration, that there was a depression there. I did not see any fragments of the skull. I would say if my memory serves me correctly, the length of that laceration was about three inches (3″) more or less. After that I saw Rowley sitting on a bench at the hospital during his convalescence. I greeted him but not in a professional manner.

When I examined Mr. Frank Rowley at Providence Hospital yesterday, Dr. Walkowski suggested

(Testimony of Dr. George G. Davis.)

that we examine, and it was agreed upon that we would take the subjective symptoms, first. By subjective symptoms we mean what the patient himself feels or complains of as in contradistinction to what the examining person might observe. So Mr. Rowley was asked the question, what he observed about himself that bothered him at the present time, since the injury, as in contradistinction during his time of normal health before the injury. The first point that Mr. Rowley made was that of headache. He stated that he had a headache; and we asked him to point where that headache was, and to point with one finger. He pointed in the area of the healed laceration at about the border of the hairline, which would be at about the junction of the middle and anterior one-third of the scar. We asked further about the headaches. He said that they were not present all the time. We asked if he had one at that time; he said "no." Asked when was the last headache, he said the night before, and they came and went at times. That was essentially the subjective symptom regarding the headaches.

Second, he complained of a ringing of the ears, which was not present all the time, but at times.

The third subjective symptom he complained of was dizziness. He felt dizzy—was the word he used. It is hard, [75] maybe, to understand what a patient might mean when he says he is dizzy, but if he said dizziness to mean equilibrium, that would go through the examiner's mind and he was asked if he used a cane and he said "no."

(Testimony of Dr. George C. Davis.)

Later, when Dr. Coffin was questioning him, he said that he had dreams that were described by him as nightmares. To the best of my memory that is a correct summary of the subjective symptoms.

I did not understand Mr. Rowley to say that he could not balance himself. I understood him to say that he was dizzy, and I am not sure just what he meant by that and that is why I asked him if he used a cane. If there was a disturbance of equilibrium and he said he did not use a cane, I thought possible further tests along that line would be advisable. I do not remember that he used the word "concentration." I made a mental note. I do not remember the details, but I remember those things outstanding were the four things, with the so-called nightmares those were the four points clear in my mind because I made a mental note—I did not write them down but I catalogued them in my mind—if I remember correctly.

Then it was decided to find out what we could from our objective point of view. Now, the fracture being in the frontal region, it seemed advisable to find out if the functions that are normally involved in the frontal region were disturbed. Those functions in the frontal region were spoken of as those of higher centers of intelligence—intelligence, consciousness, reason, conscience—so in order to test his frontal lobe physiological reaction, I asked him a number of questions. I asked him how much two times four was, and he said eight. I asked him how much three times seven was; he said 36. I asked

(Testimony of Dr. George G. Davis.)

him how much six [76] times six was; he said 36. I asked him how much two times nine was; he said 18. I asked him how much eighteen and nine were; he said 27. I says how much is three times nine; he said 27. Then to establish whether he was mentally in touch with his environment, I asked him who the President of the United States was, and he said President Truman. I asked him if the longshoremen's strike had been settled or not. He knew about the strike but he said that he did not read the paper that day. I asked him about the coal strike with John L. Lewis. He knew about the coal strike, but he did not know the outcome of it. He said again, he had not read the papers. Part of his examination was due to see if there were any aphasia—that is disturbance of speech—which is a physiological—the speech is a physiological function of the frontal lobe. His answers were made readily; they were coherent, and very little hesitation, I thought.

I palpated—upon inspection I noticed he had a scar in the left frontal region, about three inches long, evidently from a former injury antedating the one that is in question today. I did not quiz him on that. I palpated the scar in the right frontal region, which is the injury that is under discussion. It seemed firm, except in an area just above the region of the hair line which had less resistance than the posterior part of the scar and the anterior part of the scar. When I pressed upon this he gave evidence of—not—of desiring that I should not

(Testimony of Dr. George G. Davis.)

press on it—he said that caused pain. We asked him about his appetite and he said it was good. Asked him about his weight, and he said his weight had increased. As I understand it he weighs more now than before the injury, from his conversation. We were interested in this question of being dizzy —whether that word "dizzy" meant that he had a disturbed equilibrium is important. [77] So we gave him a test that is regularly applied to aviators for equilibrium test. That test consists in requesting the patient to flex his right knee, bring the foot off the floor, and after he has established his balance with his eyes open, he is requested to close his eyes and when he does that put on a stop watch and see if he can preserve his equilibrium and not touch the raised foot to the floor. 15 seconds is considered perfect, and an aviator is taken in on that score as the perfect score. If they touch the floor before they are classified as unsteady. Mr. Rowley held first his right foot off the floor with his eyes closed for 15 seconds, and then again he did the same procedure with the left. So from that test, which is a fair test, it would seem that he had not lost his sense of equilibrium, but still he had that sensation which might be difficult for him to describe, but which he classified as feeling dizzy. It is hard for one examiner to get what really the man feels by words.

Then we looked in his ears. I saw no perforation of the ear drum on either side; looked in his eyes. His eye grounds seemed normal. Looked in his

(Testimony of Dr. George G. Davis.)

nose to see if there were any cerebral spinal fluid. I saw none, and in order to check on that I requested him to cut off the air of his left nostril and blow his nose just as hard as he could on the right side, and nothing came out. Then I requested him to put his finger on his right nostril and again blow his nose hard. A bit of mucus came out, but no cerebral spinal fluid. Then it seemed advisable to test his strength, so we requested him to flex his fingers and flex his arms and extend them and touch his hands over his head, which he did. Then requested him to squat—to go down slowly and come up again. Evidently no loss of strength as far as supporting his body was concerned, or no loss of reflexes. [78]

And there was another test I made too that I didn't bring out—two tests: One requesting him to stand with heels together and close his eyes and he did not sway more than normal, if any. That is a test for balance. Also I requested him to close his eyes and bring his fingers together and touch his finger, which he did, showing his coordination was good. Dr. Coffin was anxious to see how he reacted as to his balance, evidently, going up and down stairs. So he went from the main floor of Providence Hospital up to the little turning area, about 15 steps, I would say. He went up with good coordination, and also came down with good coordination. Then we looked at the X-rays.

I am not absolutely clear just exactly what Dr. Romig said as to his findings as to the subjective symptoms of the patient, but I heard what he said

(Testimony of Dr. George G. Davis.)

today. I remember him discussing the numbness in his arm that he once complained of. I remember there was some such remark, but I am talking about our examination where we had first the subjective symptoms and then what we found. I listened to Dr. Romig's discussion in the case history.

If you wish me to say more about that, Dr. Romig stated at that time that there had been approximately an ounce of brain tissue removed at the time of the operation. Then we looked at the X-rays. There was some talk as to what was the diagnosis of an area of lesser resistance in the region of the area where the depressed fracture had been. Some persons present gave an opinion as to what their diagnosis was on that. There was a discussion at that time whether the three doctors—Dr. Walkowski, Dr. Coffin, and Dr. Davis—should discuss things together and send in more or less of a combined report. It was decided that that was not the intention—that each [79] doctor should make his opinion and his opinion should be given individually in court here; and I did not discuss the case with anybody—any doctor from that time. And that's up to now.

The X-rays showed a definite change from the time before operation. Before operation there was a very definite depressed fracture. After the operation there was a very excellent elevation of the depressed fracture. I would say, in excellent position —good job had been done. The X-rays showed that the bone did not entirely cover the area that had

(Testimony of Dr. George G. Davis.)

been opened. I mean by that, this: As Dr. Romig explained, he put the fragments back that were suitable and there were a number of comminuted or loose fragments which he did not use, feeling that maybe they were infected, but a number of them he did use. So there was definitely a bone defect, which he described as an area of about a 25c piece. There is an area, and in a lateral view you could see the bone in a very good position along the vault. But between the vault of the skull and the shadow cast by the brain, there is an area of lesser density, which Dr. Romig spoke of as air. That area, in my opinion, might be considered from a differential diagnosis point of view. There are things that give similar appearances. One is that air could do that if it pressed the brain down. On the other hand, if there were no brain tissue there, then that would cast no shadow and that area of lesser resistance could give a picture as if there were air there. I understood Dr. Romig to say that he thought it was air. I believe I heard him say this morning that could have been air or an absence of tissue. It would seem to me that the fact that the man lost about an ounce of brain tissue, and I think those who have seen the X-ray—if you could imagine that [80] you had an ounce of opaque fluid and would put that in where that brain is now, it would just about fill out that contour. That would be an estimate and my opinion. That is all.

Q. But it could also be just an absence of tissue, or it could possibly be air?

(Testimony of Dr. George G. Davis.)

A. I have an opinion on that. We have not taken that up yet. I am discussing the differential diagnosis. Those things could happen. That would naturally come under a differential diagnosis. You must have some reason to suspect it is one or to suspect it is the other. Now, we have the history, which is very definite, by Dr. Romig, that he lost an ounce of brain tissue, more or less. We know that brain tissue never regenerates, meaning by that the hair grows out if you cut it, and if you break a bone the bone regenerates and throws out new bone tissue. That is only true as to the central nervous system. That means the brain and the spinal cord. That is not true of the other nerve. You can cut a nerve and they will grow out, but when there has been a loss of brain tissue or an atrophy or death of brain tissue by scooping out or injury or trauma, the brain will never regenerate. Neither will the spinal cord if it is once dead. And that is true as to the optic nerve because it is simply an outlying portion of the brain. That is the only nerve in the body that will not regenerate.

Now, that patient has a very definite atrophy and the distance from that area, which we would speak of as the superior border of the brain tissue, you could notice it was quite a distance between the skull and the brain tissue.

Now comes up the analysis of the question of air and the frontal fracture going into the frontal sinus. About two days, I think it was, after this patient was injured, I was apprehensive because I

(Testimony of Dr. George G. Davis.)

have had cases where there has been a [81] fracture into the frontal sinus and they had air going into the cavity and cerebral spinal fluid coming out. I am not sure what day that was, but it was within two or three days. I had not seen Dr. Romig after the operations until that time, and I asked him—I called his attention to that frontal sinus fracture and I was a bit apprehensive that maybe he might have escaped cerebral spinal fluid and air, which I had in a case that was very perplexing until we overcame it. Dr. Romig said at that time he spoke to me that he had noted it. And I also asked the patient yesterday if he ever had any cerebral spinal fluid escaping from his nose, or any fluid coming from his nose, and he said "no." Dr. Romig mentioned that he had blood—bleeding—but that is entirely different picture from the cerebral spinal fluid. Clinically, this patient has not had cerebral spinal fluid nor air in his skull from the frontal sinus—that is, I am giving an opinion now. And I shall state my reasons:

Clinically, when air comes in from the frontal sinus, the patient feels that just as definitely as you can feel a boiler bubbling, and they will say, "I feel a bubbling as if a boiler were bubbling over in my skull." I have heard no symptoms such as that, and there is a large amount of fluid that keeps—runs out the nose, especially when the patient coughs or strains a bit. One can see in these cases a line of air from the frontal sinus up to the area of the fracture. In none of these X-rays have I seen any such area of air.

(Testimony of Dr. George G. Davis.)

Q. Didn't Dr. Romig, himself, say that he did not regard air as of any particular significance in this diagnosis? I am trying to save time in dwelling on this question of air. In other words, you agree with Dr. Romig on that point?

A. In my opinion that no air went from the frontal sinus into the skull? I can quit there? [82]

My diagnosis that this patient is suffering sensory symptoms as a result of an injury which consisted of a fracture of his skull which was compound, comminuted, depressed, with a laceration of the dura and a laceration and loss of brain substance, without loss of functions of the body.

Q. Do you regard the brain damage as the most significant feature of this injury? The damage to the brain is the most significant thing?

A. Well, I would not say that. I think it is of great significance, but the loss of brain tissue in itself is not very important. The entire lobe can be taken out—the frontal lobe—without loss of the normal symptoms.

Q. You mean every man can have his entire frontal lobe removed and go along fine?

A. Yes.

Q. Every man?

A. I say it could be done. Frontal lobes, both of them, have been taken out entirely and the man have orientation as to time, place and person and speech and reason and exercised mathematical problems. That is very definite; and the frontal lobe is being taken out day after day.

(Testimony of Dr. George G. Davis.)

I say that it can be taken out without loss of functions that we have thought of as essential or centralized in the frontal area. That has very definitely been done and is known.

Q. Well, does that mean, though—you mean to say that it can always be done, or it is possible to do it?

A. Well, it is done. It is being done every day.

Q. And then, if I wanted, for some reason or other, to have the frontal lobes of my brain taken out, I would do it without possibility of much injury to myself?

A. Well, I wouldn't advise it as a treatment, but I am telling you that [83] the work of Dandy's, where both lobes have been taken out—refer to the American Journal of Physiology.

I think Frank Rowley had a severe brain injury —yes.

Q. Now, Doctor, do you think that the loss of two-third of an ounce by volume of his brain tissue, from the frontal lobe, as described by Dr. Romig, would result in personality changes?

A. I think that, plus the entire episode of the injury and the operation and shock might have an influence upon the patient. I would not put it just the loss of the brain tissue so much as the shock and the contusion and the operation.

Q. I would like, though, Doctor, for you to answer my question. Do you think that the loss of two-thirds of an ounce by volume of brain tissue would result in personality changes—in your opinion?

(Testimony of Dr. George G. Davis.)

A. Well, will you allow me to connect this up with this man?

Q. I would prefer first if you answer the hypothetical question.

A. Well, I would think it might, yes. I would say that in addition to the loss of brain substance, the shock, and there is a certain amount of contusion to the brain other than the loss of the brain substance itself.

Q. Now do you think that the loss of two-thirds of an ounce by volume of brain tissue as described by Dr. Romig in this particular injury would account for the subjective symptoms?

A. I think it has its quota of influence. I think that these other—these subjective symptoms are also due to the shock of the injury and the operation and the convalescence. I think they all contribute to the change.

Q. But do you think that the loss of brain tissue that I have described would account for the present subjective symptoms?

A. I think it is possible. [84]

Q. Now, in your opinion, Doctor, do you think that Frank Rowley should some time in the future have the scar tissue removed—might have to have the scar tissue removed from his brain?

A. I don't see why at the present time.

Q. I say, at some time in the future, Doctor?

A. Yes, and I say I don't see why. I don't see the indication—the fact that this brain is not near the vault.

(Testimony of Dr. George G. Davis.)

Q. I don't think you understand my question. I said, do you think that Frank Rowley, some time in the future, might have to have the scar tissue removed from this wound?

A. Well, I say that it might be possible. I couldn't say that it would.

Q. And you could not say that he would not have to have it removed? A. No, sir.

Q. Now, do you think some time in the future Frank Rowley might have to have the fragments taken from his skull or brain vault—the fragments of skull?

A. No, I don't think that is necessary. I don't think it conceivably necessary. In the first place, for the reason that the frontal lobe is a silent area; that we see cases in childbirth where they put forceps on, you see a great big indentation in the frontal area; and the man has a normal, healthy mentality. And in this case the brain is not being pressed on by those fragments. It is quite a distance, as we see in the X-rays, where they had the discussion about air. I cannot see any need for it.

Q. You spoke of depressed skulls and mentioned infants. What about—have you had experience with adult skulls in the same regard?

A. Well, I was trying to bring out the point: In the frontal lobe, where there has been a pressure exerted by the bone depression, that these people go along and lead a normal life. I have seen many of those cases. Now, I think that this fragment will

(Testimony of Dr. George G. Davis.)

never grow to sufficient—the way we would have in the sense of a bone tumor. One [85] could think of an osteoma, a bone tumor, that would get large enough to press down, but a fracture of the skull does not throw out enough bone to protrude down to the depth that will cause pressure on the brain. In my opinion there is no possibility of a bone tumor in this case. I would say that Frank Rowley suffered a severe brain injury; that he had a loss of brain tissue—that is severe. He had a compound, comminuted, depressed fracture at the site of the application of the force, and a stellate fracture radiating at different points in addition.

From the history of this injury that I know of from the operative findings, from the post-operative course followed, from the present symptoms of the patient and from my observation of X-rays and the patient, I do not think that Frank Rowley is a malingerer. I think he stated his case very fairly. I believe that Frank Rowley should be returned to work, whether he can work eight hours a day or night I would not say.

Q. Should he be returned to regular work?

A. Well, I don't know what regular work is, but I do not see why it should not be regular. How much he can do of regular work I do not know, but I think it would be an excellent thing for him to return to what part of regular work he can do. I mean I don't know how many hours he can stand. I would put it a great deal up to him—the way he felt. After he worked an hour if he felt like

(Testimony of Dr. George G. Davis.)

working another, work another. If he felt like working four, he could work four. I would leave it up to the patient, entirely.

Q. How long do you think that condition will last where he should work only in his own discretion?

A. Well, I would let him do that until he was working full time regularly. [86]

Q. How long will that state of affairs continue where he works only at his own discretion?

A. I could not determine that, I think that the hours he works at the first return will be comparatively few that he will work; at the end of a month he will be working much more.

Q. What I want: to make it clear to you. I am speaking of this condition where he works subject only to his own will or discretion that you spoke about?

A. Well, of course that depends very much on his will. I feel sometimes as though I would never work again.

Q. Do you think that might be a week from now, doctor, when he would not have that condition facing him? Would it be a week from now?

A. Oh, I think he will have it longer than a week.

Q. Would it be a month? A. I imagine.

Q. Might it be a year?

A. Well, I believe he might have subjective symptoms a year, but I believe physically he could do his work. I think if I understand it right, work

(Testimony of Dr. George G. Davis.)

such as wiring and electrical appliances, &c——

Q. At his will and at his discretion?

A. Yes.

Q. Only at his discretion though?

A. Well, who else's discretion? You can't force him to work. I don't know what you mean. Nobody does only what they want to, but I say there should be a time—you are not sentencing him to any special work at any time. If I had a patient I would advise the patient to try to work as long as he could without undue fatigue. Yes, that is substantially what I heard Dr. Romig say that he advised Mr. Rowley to do.

Q. Now, you have said that for at least a week he would have to work at will. Now, a month from now, should he be working at his will, or could he take a regular job?

A. Well, I think if he can work on his regular job—you [87] mean to put in the eight hours a day when you say regular job? Regular job like an average man holds? Well, if his work is such that it is not too strenuous—I mean, if he is using his mentality and his hands and legs, I don't see why he couldn't improve a great deal in a month.

Q. Could he do work regularly in a month, doctor, for instance, on your payroll?

A. Physically, I think he could. I think he might be handicapped in doing it because he thinks he might have headaches, or might have what he complains of as ringing of the ears, or what he

(Testimony of Dr. George G. Davis.)

speaks of as dizziness. But physically, when you say the word "could" that means "to be able to" and I think he could.

I think it is possible that Frank Rowley might have a feeling of headaches a year from now. I would not know whether he could have dizziness a year from now. I would believe that he could not have them recur a year from now?

Q. Is it possible that he might tomorrow recover completely—have no feeling of dizziness, headache or any of the symptoms he has described, and then have them recur a year from now?

A. Well, there might be a change of condition. I would say that it is possible for the person to have a change of condition.

Q. Now, is it possible for those symptoms to recur, say, ten years from now?

A. Well, that is pretty hard to say what is possible and impossible, but I would say he might have a change of condition, even at ten years—it is possible he might, but I wouldn't say it was probable.

Q. Now, doctor, what would you advise Frank Rowley to do with regard to working?

A. I would advise him to go back to work.

Q. What work?

A. Whatever work he does. [88]

Q. You don't know what that is?

A. I understand that——

Q. Wait—do you know what that is?

A. No, sir.

(Testimony of Dr. George G. Davis.)

Q. Now, what are the possibilities, doctor, of Frank Rowley contracting epilepsy in the future, or today?

A. Well, if you will describe to me what—what you mean when you say "epilepsy"—now epilepsy is a very general term.

Q. I use it in the same sense as it is employed in Wechsler here, for instance. We were discussing what we meant by epilepsy and I said what was referred to in the Attorneys' Texbook of Medicine of epilepsy. There is a chapter at page 251 in Gray's Text entitled "Fractures of Skulls." A sub-chapter is entitled "Epilepsy". Now that is what I mean by epilepsy. Now, doctor, based on your diagnosis of Frank Rowley, what possibility does he have of suffering from epilepsy, in the future?

A. If we might discuss the word "epilepsy" a little further I would try to bring out my opinion.

Where he says fractures of the skull, that is a very general term. It depends where the fracture is and what type of epilepsy. For instance, the word "epilepsy"—the average person feels that when you say epilepsy they speak of a fit.

Mr. Hellenthal: His is a medical book, doctor.

A. Yes, I am talking about a medical book, too —use that as a general term. Epilepsy is used as a general term, but if you read further there in this book, you will see under the classification of epilepsy you will see major mal and petit mal. Do you see that there?

Mr. Hellenthal: No, doctor.

(Testimony of Dr. George G. Davis.)

A. Well, it is in there, I will bet.

The Court: What are those words? [89]

Witness: Grand mal and petit mal, grand meaning large and petit meaning small. Now, the sentence that you read there talks about fractures in general. Now, in grand mal we get contractures in epilepsy, and they may be of a origin idiopathic from unknown causes or they might be from a fracture in the motor center area. If they are not in the motor center area they would not get the sense of epilepsy in the sense of grand mal. That's where you get contractions and falling down and losing consciousness and biting your tongue and the tongue bleeding. Now, there are other types of epilepsy that are not connected with grand mal and that is called petit mal, where a patient will have a sensation of something the matter with his brain—maybe a sensation of dizziness and, unknown to him, he loses consciousness but he has no seizures. I saw a case recently down here at the——

Mr. Hellenthal: Now, doctor, have you defined epilepsy, then, as consisting of two types, grand mal and petit mal?

A. Yes, and other types, traumatic and non-traumatic.

Q. What other types?

A. Idiopathic. Those are the main classifications. Generalized epilepsy is when it starts in one part of the body; in Jacksonian epilepsy that is a term applied to epilepsy where it starts from——

(Testimony of Dr. George G. Davis.)

Mr. Hellenthal: Well, there is another——

Mr. Grigsby: Let him finish his answer, please.

The Court: Go ahead, Doctor.

Witness: You asked me what they meant by generalized epilepsy and I was trying to answer it.

The Court: Go ahead and answer it.

Witness: Now, in trauma or an injury or a violence that is over the motor centers—I am not referring to the frontal lobe area, but where they are in the motor areas, where one has a trauma or an injury at that site, and it has caused an irritation of the motor centers, the origin, or beginning of [90] the attack is in the muscles that are supplied by that area. For instance, if it were in the arm muscle center on the left side the first contracture would be in the right arm. Then it goes to the neighboring centers—to the right of the face and the right leg. Then it spreads to the other side of the body and we have a generalized epilepsy which means there is a generalized contracture of the muscles of the extremities on both sides.

Mr. Hellenthal: Then there is another side of epilepsy you didn't mention—generalized or Jacksons?

A. Jacksonian. That is synonym for traumatic epilepsy. But those all start in the motor areas.

Q. Now, how do you account for this statement in Gray's book:

> "It is not infrequently ascertained that epilepsy follows a head injury. Without doubt, many unjust claims have been successfully

(Testimony of Dr. George G. Davis.)

made upon this basis, alleging trauma to be a causation or aggravating factor. Authorities no longer believe this to be very likely unless the injury was quite major, usually with fracture."

Was there fracture present there?

A. Was there a fracture?

Q. Yes.

A. Certainly, there was a fracture.

"According to Glaser and Shafer, it is possible for such a condition as generalized epilepsy to appear within ten days following major damage. As a general rule, onset is from six months to two years, infrequently up to seven years, and very rarely so long as 20 years later."

Now, what do you think of Mr. Rowley's possibilities of suffering from epilepsy in the future?

A. I would say "no," that [91] he will not have a generalized epilepsy. He might have a petit mal, but he will not have generalized epilepsy because it is not over the motor areas. He will have no contractures.

Q. But he will have petit mal, or there is a possibility?

A. I didn't say he would. I say, there is a possibility of it.

Q. All right, Doctor, now let's—what are the possibilities in the future of Frank Rowley suffering from late meningitis?

A. I think they are nil.

(Testimony of Dr. George G. Davis.)

Q. How do you account for the statement in Wechsler's Textbook of Clinical Neurology at page 538 to the effect that fracture through the frontal sinus may result in late meningitis?

Mr. Cuddy: Your Honor, I think the book should be shown to the witness, if he intends to impeach his own witness.

The Court: You may look at the book, doctor.

Witness: Well, I will discuss that if you want, the possibility of meningitis in relation to air coming through the frontal sinus, if that is what you mean.

Mr. Hellenthal: No, I just say this statement: "Fracture through the frontal sinsus may result in late meningitis"—what does that mean?

Mr. Cuddy: Your Honor——

Mr. Grigsby: Let him answer.

Witness: There may, if there is an opening from the cerebral—with the escape of cerebral spinal fluid into the frontal sinus, but my opinion in this case—in my opinion he did not have that, any, in my opinion——

Mr. Hellenthal: Now——

The Court: Wait, Mr. Hellenthal, please.

Witness: In my opinion—his temperature is normal [92] today, he has had penicillin, he has had sulfathiazole, and my opinion is there is no infection going from the frontal sinus, from the meninges, and there will not be any subsequent from now.

(Testimony of Dr. George G. Davis.)

Mr. Hellenthal: Now, Doctor, what is the possibility in the future of Frank Rowley dying from the wound that he received?

A. I don't see any probability of that whatsoever.

Q. How do you account for the statement, again of Wechsler at page 538, to the effect that:

> "The death rate is high in lesions in the neighborhood of the medulla and frontal lobes?"

A. Well, of course, it is very high in the medulla because that has to do with the breathing, the center of respiration, etc., but I think that the rate is not so high any——

Q. But it is high——

The Court: Pardon me, Mr. Hellenthal. Please let the witness complete his answers.

Witness: I think the rate of death in frontal lobe fractures and injuries is not high.

Mr. Hellenthal: But there is a rate.

A. I suppose there is, but I cannot give statistics, but it is not high. There is always a rate, but it is not a high——

Q. But there is a possibility of death because of a fracture of the frontal lobe or injury?

A. Not per se. It depends upon the complications. You have to have a specific case. You can't just classify all cases under one. You have to discuss your pathology.

(Testimony of Dr. George G. Davis.)

Q. Now, Doctor, what are the possibilities of continued headache in Frank Rowley's case?

A. Of their continuing?

Q. Yes?

A. Well, I think they might continue for [93] some time.

Q. For how long, Doctor?

A. I couldn't put a stop watch on that, but it might be months.

Q. Months? Longer even? A. Yes.

Q. Could it be five years?

A. Well, I wouldn't say.

Q. Could it be ten years?

A. I wouldn't say.

Q. Could it be twenty years?

A. I would believe not.

Q. Now, what is the possibility, Doctor, of vertigo—continued vertigo in the case of Frank Rowley?

A. Well, that vertigo—you are referring to his sensation of—he describes as dizzy?

Q. Well, whatever you think or I might think—vertigo, I think?

A. Yes, and so we can talk the same language, I am saying the word he used as "dizzy". I think he might have that for some time.

Q. How long? Maybe months?

A. I couldn't say.

Q. Maybe months?

A. Might be a few months.

Q. Maybe a year? A. Possibly.

(Testimony of Dr. George G. Davis.)

Q. Possibly five years? A. I doubt it.

Q. But possibly? A. I doubt it.

Q. Now, Doctor, what is the possibility in the future of blindness in the case of Frank Rowley?

A. Of blindness?

Q. Yes?

A. I think there is no possibility. He is already blind in the right eye, but I don't think there will be any blindness that will come from this complication in his left eye.

Q. Now, what is the possibility of insanity, in Frank Rowley's case?

A. I would say that's nil.

Q. Absolutely no possibility?

A. Well, that is my opinion—in his case. [94]

Q. If an infection were to set in in this fractured area, could it result in Mr. Rowley going insane?

A. I don't think infection causes insanity.

Q. Could infection cause a degeneration that might result in insanity?

A. Well, if there is more brain tissue, and we take the word "insanity" to mean in the sense of abnormal mental reactions—not being of normal mental reactions—it is possible that there might be certain infections that could cause—but I see no reason in his case where there is any source of infection that would cause such an irritation of the brain to produce insanity in his case.

Q. If Frank Rowley were to have another brain operation, is it possible that at that operation an infection might set in? A. If he——

(Testimony of Dr. George G. Davis.)

Q. If Frank Rowley were to have another brain operation, could an infection set in at that operation?

A. An infection can set in at any operation.

Q. Could that infection cause his death?

A. If it were severe enough it would.

Q. Could it cause blindness?

A. If it were the type of pathology to produce blindness it would, but I don't know what that would be.

Q. Could it cause epilepsy?

A. If it were of such a nature as to cause irritation of the motor centers, it could cause epilepsy.

Mr. Hellenthal: I have nothing further.

Cross-Examination

By Mr. Grigsby:

Q. Doctor, is this skull fracture an unusually severe fracture?

A. Well, it is a severe case. It is compound, comminuted, [95] with a loss of brain tissue. That is just what it is, but it is not an uncommon case. I mean, we see them frequently. I, myself, have had experience with similar cases. I would say several hundred. I have, myself, operated on a great many—would say several hundred cases, not in the frontal region alone, but skull fractures, some of them in the frontal region. As to the effect of this experience this man has gone through with respect to the criminal proceedings, and the pendency of this civil litigation, I think that makes him intro-

(Testimony of Dr. George G. Davis.)

spective, and worry about his case, which is a psychological but not an anatomical reaction. I think that he would observe himself more acutely.

As a result of that physical examination I made day before yesterday, eliminating the subjective symptoms—that is of what he feels that an examining person cannot very well evaluate—I find that there is practically no loss of function. I do not see any loss of function that the man has. I would say he is in good condition. I heard Doctor Romig's statement to the effect that the man is getting worse in reecnt weeks. I think that there has in all these cases—I have noticed in litigation in corporation cases for 17 years, where a man is coming up for trial, that he has a very definite reaction either subconsciously or consciously, where he is introspective and he analyzes his subjective symptoms very carefully; and frequently, particularly if the case comes to a conclusion, if the patients are relieved from this introspective reaction, then I think their mental reaction greatly improves from a mental point of view.

Mr. Grigsby: What in your opinion, from your diagnosis and what you know about this case, as to the best thing to do with this man right now?

A. Well, I think one of the healthiest [96] things for this man right now is the termination of this case, and for him to get back into what would be the approach to a normal life. I mean by that to start to do work.

(Testimony of Dr. George G. Davis.)

Redirect Examination

By Mr. Hellenthal:

In 1943 just prior to coming to Anchorage I practiced surgery in Chicago and taught surgery in Cook County Hospital. I did not come immediately from Chicago to Anchorage. I came to Bristol Bay; landed there the 1st day of June, and if my memory serves me correctly, left there the 7th of August. I was employed in Bristol Bay with the Naket Packing Corporation, at Nakine on Squaw Creek, in the capacity of surgeon. It was at Nakine across from Koggiung.

And thereupon,

FRANK ROWLEY,

having been heretofore duly sworn, and testified in his own behalf as follows:

Direct Examination

By. Mr. Hellenthal:

My name is Frank Rowley. I was born in Grand Valley in Colorado, on February 7th, 1905. I am 41 years old. I went through the 8th grade school at Grand Valley, Colorado. Also went to Trade school; it was I believe in 1924 in Kansas City. The Finley Engineering College—I went there approximately a year. It was a school that taught electricity and general practice. It was a night school. I worked days and went to school at night.

(Testimony of Frank Rowley.)

Q. Now, Frank, what did you study at that school again?

A. It was the practical work—the practical workings of electricity. Well, just a practical school. In the early part of my life after I left the Eighth Grade I worked in the orchards some in Colorado until I was approximately 17 years old. Yes, I lost my right eye when I was 13 years old,— [97] that is, I injured it when I was 13, and the eye was removed when I was approximately 18. After working in the orchards I took up work from day to day, just ordinary work as you do through your life to make a living. After leaving the orchard work I took up electrical work. My first job was working in a shop in Kansas City. It was an independent electric machinery company. It was a big shop there. They done all kinds of repairing, and repairing of the motors and re-winding. I started out with that company just as a helper, just general cleaning up and doing squaw work—light work. After I left that organization I was winding motors. I spent three years at that work in Kansas City. I think it was '22, '22 and '23. Before going to Kansas City and before leaving the orchard work I worked for the Denver Tramway for a while; of course that was just common labor,—that is in Denver, Colorado. When I was working in Kansas City for those three years I started at 25c an hour—and when I left there I was getting 75c. I went from there to Chicago. In Chicago I worked for the Gregory Electric. I

(Testimony of Frank Rowley.)

was working in the transformer department winding transformers, mostly old ones—re-winding and repairing. I was there approximately six months. Then I went to Wichita, Kansas—worked there for Kansas Gas and Electric Company, repairing transformers. That consisted of taking transformers apart and cleaning them up and sometimes replacing some of the wire in them—the coils—and down in that country where they got lots of lightning they had a lot of breakdowns and it was repairing breakdowns. I was approximately three years with Kansas Gas and Electric Company. Those years were '25, '26 and '27. While working there I made approximately $150 a month, an average figure. I believe I started at $125; when I quit I was making $175. After working there in Wichita [98] for the Kansas Gas and Electric Company I went to Colorado. I worked for the Great Western Sugar Company out of Denver for about two years. That was general electric work—practically every line of electrical work. Well, it is some wiring, and some motor repairing—repairing motors, and trouble shooting. I made around $150 a month on that job. After that I worked in ore mines down in New Mexico in a little town called Magdalena—followed electrical line there, general electrical work. It was working through the mines, and also in the shops and power house—it was general electrician. On that job I made approximately $175 a month and board. I believe that was in '27 and '28. It may have been later than that. After leaving Magda-

(Testimony of Frank Rowley.)

lena I went to California. I worked around Fresno, California, for the Southern California Edison. That was general construction work. They was building dams and tunnels and such for power houses north of—I made around $175 and board at that job. Worked for the Southern California Edison Company approximately six months. From there I went back to Colorado, and from there hired out at a place at Casper, Wyoming. I worked for a small outfit there winding motors to start out with. I worked for them a couple of years and then I started my own place. My own place of business, winding motors, repairing and winding and rebuilding motors. I was in Casper working for others and myself from '32 to '38. During that period I made approximately $200 a month. When I was working for wages I made $150 a month, and when I was on my own entirely I averaged around $200. I came to Alaska in 1938 from Casper. When I first came to Alaska I done some truck driving, and done common labor—well, practically anything I could find for the first couple of years I was here. I got [99] that scar that I mentioned yesterday on my head outside of Kansas City in a car accident. The car ran off the road and turned over and I cut myself on the glass. I got a glass cut. There was no fracture—just a class cut. After I was driving a truck and done common labor I worked for McCarthy Brothers on this Federal Building. I worked with them clear through the job from the start to the completion. That was

(Testimony of Frank Rowley.)

about a year and a half. On that job I did everything. I started out as common laborer, and I worked through the whole job. I fired the boilers to heat the building while it was under construction. I did very little electrical work. I got approximately $225 a month on that job. I was injured while on that job. I slipped on an icy runway and got a hernia on the left side. I could not tell what kind of a hernia. There is a scar from it, yes. There was an operation performed. It took me approximately three months to get over that hernia operation. When I got over it I went back to work for the McCarthy Bros., the same outfit I was working for when I got the hernia, and then finished the job with them. After that job was completed I done a little electrical work around town here, and then I went to the Matanuska Valley and worked on the REA—Rural Electrification—at Matanuska and Palmer. I had a contract with them for putting in some electrical equipment. I got that on a bid. I bid approximately $3,000. The job was installation of meters —meter services, throughout the valley. I was on the job approximately—well, the shortage of materials and things—it run over about two years—almost two years. While I was doing that I did house wiring and general electrical work over the valley. I was at Palmer approximately one and a half years at first, then I [100] had to go back late and finish up the job as the material come in. That was the fall of '41 up into the winter of '42. I

(Testimony of Frank Rowley.)

made $300 a month on the average during that period. After that job was finished I went to work for the City of Anchorage; that was general electric work; a lot of times I read meters, sometimes repaired transformers, and I did a little line work; it was just general electric work—they would define it in some outfits—just different work; all kinds of electrical work. I made approximately $350 a month at that work. Worked for the City of Anchorage two years, '43 and '44. After that work I went out to the Post and worked for the War Department from that time up to the time of the injury. I started there around the first of the year 1945. I worked in the motor repair shop; they repaired electric motors. My job was classified as Electric Motor Repairman. That work consisted of lots of times just repairing motors—maybe putting in bearings, and from there to re-winding and putting in a new winding. It was motors—lots of them were often ventilating fans, and, oh, they have, I think, 11,000 motors out there through the Post and they was all shapes and sizes and for different causes. There were big motors, a hundred horsepower I believe is the biggest motor I worked on out there. It weighed about 1500 pounds. There were others down to very small ones. In repairing a motor you have to take it apart and if it is a burnt out motor you have to take out the old winding and put new insulation in it, and make new coils and assemble the coils, and connect it up the way it was. You have to know something about a

(Testimony of Frank Rowley.)

lot of different kinds of motors for to do that. There are hundreds of different kinds. They have every [101] kind of motor that is made out at the Post. I made $245 for two weeks—as high as $245 for two weeks—about $450.00 a month. It varied some in different months. Soon after the war they cut us down to—well, for a while we went to a 40-hour week, and of course that cut it down considerable—cut down the average. I was paid $1.71½ an hour when I started at the Post, and when it ended $1.75 an hour.

(Witness is handed a paper marked "Plaintiff's Exhibit No. 124" for identification.)

Witness (Continuing): That is my payroll statement for 1945 (paper admitted in evidence without objection). Witness continuing: I made $5152.90 in 1945; that was gross before deduction of taxes, etc. I was making approximately $400.00 a month in 1946. On top of that we got 26 days annual leave and 15 days sick leave. That figure of $5152.90 does not include that—you get that additional. I have taken that. I took that time last summer when I was working at Mountain View. I took 24 days I believe of annual leave for working. I stopped work at Fort Richardson about the 1st of July, maybe the 10th. Don't know just what day. I took leave to do some work at Mountain View. I was putting in an electrical distribution system there. I started figuring on it approximately the first day of the year and I had done considerable

(Testimony of Frank Rowley.)

work on it and I got a couple of Diesel driven generators from the surplus property office. They were generators for generating electricity—Diesel driven, two of them, capacity 40 KW each. I had poles and materials for building lines out there. I had poles and cross arms and general material for building lines. I had around 30 poles around the 1st of July. I was putting up the poles in the month of [102] July. I dug the holes then I had to have a crane from town go out and lift the poles in the holes. That was in the month of July. Those poles weighed up to 500 pounds. They are regulation electric light poles 35 feet long. I was getting up this electric distribution for the public out there —for the residents of Mountain View. There were approximately 100 dwellings. I had contacted the people and taken a survey of the Mountain View district in the month of May while I was working at the Post, after working hours. After working hours during May of the spring of 1946, in connection with that power plant, I done a lot of preliminary work. I dug holes after I went home from work at the Post. I did general—just everything, in connection with that project. I went to see people to subscribe to take my power—had them sign up. I came and saw you about it some time in May, to draw up a contract. I had about $5000 of my own money in that business—I cannot say how much labor. I have everything I got in that business. It is paid up. I was going to start that business like an ordinary utility company would.

(Testimony of Frank Rowley.)

I figured on putting in meters and charging so much a KW hour. I planned to have it in operation about the 1st of September.

I am married; was married in '33 in Douglas, Wyoming, and still married to the same woman. I have 5 children—the youngest is Raymond Rowley, age 3 years; the next boy is Franklyn, age 8; then Alleen, age 9; and Billy Ann, her age is 11; and Effa, her age is 12. My wife has never worked. I live at Mountain View, known as East Anchorage. My house out there is more or less under construction. I have one big room and three rooms under construction, but this cold weather I have blocked off and we are using just one room at present. My whole family lives in one room. [103]

(Witness is handed Plaintiff's Exhibit No. 125 for identification.)

Witness, continuing: That looks like a statement from the hospital — Providence Hospital. The amount shown on that is $744.25, the date December 9, 1946. My name is not on it. The name of Z. E. Eagleston is on it. This is for services performed on me. It says: "Rendered Mr. Frank Rowley." Paper admitted in evidence as Plaintiff's Exhibit No. 125.

Witness, continuing: Since I left the hospital the doctor told me it would be all right if I done light work, but not to go beyond what I felt like I should do. I have done some work since I got out of the hospital. I believe I was in the hospital

(Testimony of Frank Rowley.)

29 days. I have done very little work since I got out, consisting of fixing up around the house. I had work around the house banking up and getting the air out from under the house for the winter, and things of that kind. I did nothing in connection with my power plant business or distributing business. I have hired a little in connection with that as far as I could. I hired a man around the first of September. When I was in the hospital there was one of my generators—one of the motors on one of the generators my friends had taken apart and figured to overhaul it, and he had taken it apart and he got sick and wasn't able to put it back together, and it was in Ken Hinchey's place of business, and I hired a man to put that back together, and Ken Hinchey wanted it out because he wanted the space, and I hired a man there to put the machine back together so I could get it out and got it back to Mountain View. I paid him wages about $70.00. There is no [104] other work I have done outside of fixing up the basement and fixing the house since this injury. I can't do any lifting—I have—that is absolutely—I have tried to do so, but I can't do it, that is all.

In connection with my distributing system I used to climb up telephone poles. I have not done that since this injury. I do not think I can do it. I would not want to try it. I have considerable headaches now which, at points, right at the point of the injury, and if I get over tired why that gets greater. The best thing I find to do when

(Testimony of Frank Rowley.)

I get tired is to go lay down and rest for a while. I do that when I get a headache. Sometimes the headaches come on quite frequently, maybe three or four times a day at most, and other times I will go maybe a day without one. That is about the longest I have gone without a headache—a day. I have other things that bother me. I have ringing of the ears. My ears ring considerable. Sometimes it will come on and last several hours, and other times it may be a day or so without any ringing of the ears. I get dizzy spells. I feel off balance at times. It just lasts a few minutes at a time. Maybe—oh, sometimes it will happen twice a day and then sometimes it will go two or three days without.

It hurts my head to concentrate. I can't—if I concentrate, why, my head gets to hurting and I just can't—I just can't concentrate. I don't remember of anything else right at this time. Sometimes I don't sleep well at night. I don't sleep at all at night, and then when I do go to sleep my—I have dreams—I have dreams—I have bad dreams—dreams that you don't like to have—oh, people chasing me with guns and everything, and I wake up in a cold sweat and—between times I feel pretty good. There is times that I feel good. I don't feel like I could go back to [105] my regular work at the Post, because I could not do any lifting, and I do not believe I could stand eight hours standing up to bench working. I don't believe I could anyways near stand it.

(Testimony of Frank Rowley.)

(Document offered and admitted in evidence marked Plaintiff's Exhibit 126: Witness handed Exhibit 126.)

Witness, continuing: That is a Withholding statement for 1945 and 1946. It shows my total wages for 1945 to be $5152.90 for the period January 1st, 1945, to December 9th, 1945. For 1946 it shows $3395.05, that is from 12/10/45 to 9/15/46.

I used to fight a little when I was a kid. As far as—since then I never have done any fist fighting. I think I have always tried to avoid it.

I have earned nothing since this injury on the 30th day of July. I received a check for reporting to the Jury about ten days ago. That is all I have earned.

Prior to this injury I used to work in my spare time and after hours on my power plant. Since this injury I have not been able to do as much work as I did in my spare time prior to the injury.

Cross-Examination

By Mr. Grigsby:

I stated after I had been advised by my physician to be careful not to overdo any work I might attempt. I followed that advice. I have, however, done some light work around my house, banking it up. I did not use a wheelbarrow. I have never used a wheelbarrow since I got out of the hospital that I know of. I had a man use a wheelbarrow

(Testimony of Frank Rowley.)

for me. I did not use it myself. That man's name was Burke. That was somewhere in the middle of September. I did not attempt to use [106] the wheelbarrow in connection with banking my house. I did not try to. I did not build a scaffold around my house. I had a man bring one to the house; he put it up. I took no part in it. I did not do any work with reference to peeling logs. I can't do any lifting. I just can't do it. I know what peeling logs is. I never did any of that since the injury. I had a man hired for a few days peeling logs. I did not do any of it myself. The man I hired was a soldier. I paid him with a check; he was an ex-soldier, and I would have to look on the check to tell you his name. I have not undertaken to climb poles at any time since the injury. At the present time I feel that I would not care to do anything like that. I have not tried to climb poles because I do not feel like doing it. I have refrained from attempting any lifting on account of the advice of my physician. He advised me not to do any heavy lifting.

Those amounts of my earnings in '45 and '46 include overtime for both years. I did considerable amount of overtime. I would not be able to state from the exhibits what proportion of overtime. That would have to be figured out.

And thereupon,

ALBERT HENRY DYER,

being first duly sworn, testified for and in behalf of the plaintiff as follows:

Direct Examination

By Mr. Hellenthal:

My name is Albert Henry Dyer. I am a cement finisher. I have been around Anchorage for 18 years; in Alaska 23 years. I know Frank Rowley; have known him for four or five years. I know Mr. Rowley's habits with respect to industry; that knowledge is based upon my own observations. His habits as to [107] industry are good. He is a steady, dependable man. I know his habits as to sobriety; they are good. I mean that he is not a total abstainer, but that he is also not a habitual drinker. He is a sober man.

And thereupon,

FRANK ROWLEY,

recalled, having been heretofore duly sworn, testified as follows:

Redirect Examination

By Mr. Hellenthal:

I have suffered much pain at the time of this injury and since. The first two or three days in the hospital I do not remember a whole lot what took place. There is a few instances that I do

(Testimony of Frank Rowley.)

remember but I—I do not remember but very little the first three or four days, and then I seemed to gradually get better, but my head hurt and mostly —well, it hurt until I got out of the hospital, and then it hurt mostly when I tried to do any thinking or anything. I couldn't do very much thinking. It was best to relax. I always felt better when I really fully relaxed, because when I get in a strain or try to think, why, I get severe headache, and that hurts.

Q. Now Mr. Rowley, have you given much thought to your future?

A. Well, it worries me to——

Mr. Grigsby: If the Court please, we object to this line of examination as immaterial to the issues set up in the complaint. There is no claim for anything except loss of capacity to labor and pain and suffering, and the complaint contains no claim for damages for mental injury whatever except, of course, what would be inferred as affecting capacity [108] to work, but his thoughts for the future I think are immaterial.

Mr. Hellenthal: Your Honor, I am introducing this under the complaint—to prove mental suffering.

The Court: Objection overruled. You may answer.

Witness, continuing: Well, the future does worry me to a certain extent because I have a large family and—but I try to keep from worrying as much as I can because it don't do me any good, because worry is the worst thing I can do for my health, I figure.

(Testimony of Frank Rowley.)

In approximately the middle of September I had a man helping me—well, I had him doing the heavy work, and there was a time when I borrowed a wheelbarrow from the neighbors and I generally went and got that wheelbarrow and took it back in the evening. It was empty. I have not at any time wheeled a loaded wheelbarrow, at no time since this injury. I might have stood by a wheelbarrow, or been in the vicinity of one. That same observation applies to peeling logs, or the other things mentioned by Mr. Grigsby.

And thereupon,

NORMAN C. BROWN,

being first duly sworn, testified for and in behalf of the plaintiff, as follows:

Direct Examination

By Mr. Hellenthal:

My name is Norman C. Brown. My occupation is publisher of a newspaper, the "Anchorage News". I have been publishing that paper for the past year. I know a man by the name of Slim Eagleston; have a speaking acquaintance, I would say. I do not know much about his reputation.

Q. Do you know Mr. Slim Eagleston's reputed wealth?

Mr. Grigsby: We object to that, if the Court please, it is immaterial; it is not the proper method of proving financial resources.

(Testimony of Norman C. Brown.)

The Court: Well, you may ask the question anyhow upon that, and a pro forma ruling will be made only upon the evidence, and if the Court feels that it is inadmissable at a later date, it will not be considered.

Witness, continuing: I know Slim Eagleston's reputed wealth no more than most other acquaintances, I imagine, in Anchorage. I know he has assets. He has assets that I know of, just as everyone else knows Mr. Eagleston knows he owns property building—he owns a store, and that's all. As far as a bank account, I don't know anything about it. I would say he has a reputation for having some money. It was that reputation I had in mind when I wrote an editorial.

Mr. Grigsby: Wait a minute. We object as to what he had in mind when he wrote an editorial.

The Court: Overruled.

Cross-Examination

By Mr. Cuddy:

I do not know of my own knowledge as to the wealth of Mr. Eagleston, except just what is apparent. He does owe some money, yes. I know he owes money. I do not know what his net worth is.

And thereupon,

GEORGE PETERSON,

being first duly sworn, testified for and ir behalf of the plaintiff as follows:

Direct Examination

By Mr. Hellenthal:

My name is George Peterson. I am electrical superintendent [110] at the Post Engineers at Fort Richardson. I know Frank Rowley, have known him since the early part of 1945, since around May of 1945. He is classified as a shop electrician. I was his superior, since May, 1945. His principal duties are repairing motors, rewinding motors, that would include generators, transformers—they would be the principal items. Mr. Rowley's work involved complete repair of motors and that would be checking motors and generators, transformers, for defects and correcting those defects; any rewinding that was necessary. In other words, taking the motors as they were when they were not working and putting them in good shape. That refers to all shapes and types and makes of motors. At the Post we have small motors that run from about 1/32 horse on up to a hundred horse, and practically every make that is put out at the present time. Those different makes vary very considerably as to their requirements as to winding. The same applies to generators and transformers. A hundred horsepower motor would weigh

(Testimony of George Peterson.)

14, 15, 16 hundred pounds. Mr Rowley's work, from my observation and knowledge, involved expenditure of much energy and heavy work. Any motors that—transformers, anything he was working on—in taking those apart there are some pretty heavy parts to handle in them. He would be probably be handling heavy work about every day. The motors we get into the shop are in there for some defect. That requires it to be taken apart, checked over, that the old windings be removed, then rewound with the proper winding which includes quite a bit of figuring as far as sizes of wires, and so forth, are concerned, and then insulated properly and replaced and checked, and properly installed after they are completed. It requires much prior knowledge; it takes quite a bit of experience on that. It requires the exercise of judgment and discretion in searching for defects in motors, generators and dynamos; it requires much knowledge because it requires the use [111] of various types of meters and the calculations that go with them. I have known Mr. Rowley since May of 1945. I have had occasion to observe him very closely during that time. He has been working there during that time. He has been a steady man on the job. He has been off very few days and they were various legal excuses, sickness, etc. He has been sober every day he has been on the job and that has been practically all the time. I know something of Mr. Rowley's Mountain View dis-

(Testimony of George Peterson.)

tributing system. I have seen it once or twice. He had two generators set up there at Mt. View. He had one running the last time I had seen it. He had overhauled that one completely and he was working overhauling the other one. He had a few poles set on the pole line and some wires strung.

Mr. Grigsby: We would like to have the same objection, your Honor, to all this line of testimony that we made to the examination of Mr. Rowley.

The Court: Very well, objection will be noted to the entire line of testimony.

Witness Continuing:

As to the kind of plant he had, there were two caterpillar diesel generators. I believe they were caterpillars, and they were both 50 KW's. He had both generators set up under cover at the time I had seen it. I wouldn't say as to how many people would take juice from Mr. Rowley's plant if it were in operation. I would have to know more the layout of the wiring, and so forth. I was out there and saw Mr. Rowley working on overhauling his motors. He had one of them that was installed and running. The other one he had off the motor and had one of the end belts off the generators. That is heavy work. I couldn't make a guess as to how many poles he had up out there.

And thereupon,

ROSE WALSH,

being first duly sworn, testified for and in behalf of the plaintiff as follows:

Direct Examination

By Mr. Hellenthal:

My name is Rose Walsh. My official duty with regard to records is recording records of mortgages, deeds, bills of sale, etc., in the Commissioner's Office for the Anchorage Precinct. I am the U. S. Commissioner and ex-officio recorder for the Anchorage Precinct. (Witness is shown a book.) This is Book 53. It is a book in which we copy the mortgages and other instruments like that—real mortgages. There is a mortgage in that book entered into between Z. E. Eagleston and L. McGee. It is found in Book 53, beginning at Page 325. The principle is $48,000.00. This is a real and chattel mortgage.

Mr. Grigsby: I would like to have the purpose of this evidence stated. I believe it is stated it is a mortgage of Mr. Eagleston as mortgagor to Mr. McGee. What is the materiality of the testimony?

Mr. Hellenthal: To show the actual and reputed wealth of the defendant.

Mr. Grigsby: Object to it as incompetent for that purpose. The fact a man borrows money——

Mr. Hellenthal: If it please the Court, only a wealthy man can borrow $48,000.

(Testimony of Rose Walsh.)

The Court: That is a matter for argument. Certified copy of it may be admitted. If counsel wishes to summarize it now he may.

Mr. Hellenthal: This is a mortgage entered into between Z. E. Eagleston and L. McGee. The sum is $48,000. It is dated the 4th of November, 1946, signed by Z. E. Eagleston in the presence of Shirley West and W. N. Cuddy; sworn to before Mr. Cuddy. It is in proper form. It is a chattel and real mortgage. It [113] encompasses all the whole of lots 1, 2, 3, 4, 5, 6, 7, 8, 9, 10 and 11 of Block 26-C of the subdivision of the South one-half of block 26 of the East Addition; all of Lot 11 in Block 45 of Anchorage; all of Lot 9 in Block 47 of Anchorage; all of lot 8 in Block 4-D of the Third Addition of Anchorage; and together with all the chattels and everything attached thereto. Chattel mortgage covers all the buildings located on Lots 1, 2, 3, 4, 5, 6, 7, 8, 9, 10 and 11 of Block 26-C of the East Addition; two buildings 20 by 120 feet by dimensions; one Pacific Hut 16 foot by 36 foot in dimensions; one large dwelling house; a merry-go-round; one double loop-o-plane, and all lumber and building materials located on the premises; all buildings located on Lot 11 in Block 45, on Lot 9 in Block 47, and on Lot 8 in block 4-D of the Third Addition; one 1941 Buick sedan; one Chevrolet truck, half ton, 1942 model; one 1941 Dodge sedan; one 1941 GMC stake truck; all refrigerators located on Lot 11 of Block 26-C. A note secured by the mortgage—the note accompanies the mortgage in

(Testimony of Rose Walsh.)
the sum of $48,000 bearing interest at eight per cent. Aside from that the mortgage is in the usual form.

And, thereupon,

R. S. RICHARDS,

being first duly sworn, testified for and in behalf of the plaintiff as follows:

Direct Examination

By Mr. Hellenthal:

My name is R. S. Richards. I live at 905 Fourth Avenue. My business is electrical contracting. I have known Frank Rowley for approximately four years, have had a good chance to observe his habits as to industry. He was with us in motor re-wind work for approximately a year and a half. I saw him every day during that time. That was in '43 and part of '44. He was about as steady a man as I ever saw. I have never seen him [114] intoxicated in my life. I know Slim Eagleston's reputation as to wealth. He is a man of considerable wealth. His reputation as I heard it is, he is worth a quarter of a million dollars.

Cross-Examination

By Mr. Cuddy:

Other than what I observe, I don't have any access to any of his personal affairs, of course. I do not know what he owed. I have just overheard conversations of other business men and things of that nature, not with Mr. Eagleston.

And, thereupon,

A. H. DYER,

having been heretofore duly sworn, resumed the stand and testified further in behalf of the plaintiff as follows:

Direct Examination

By Mr. Hellenthal:

I know Slim Eagleston just by sight. I know his reputation as to wealth—that I have heard on the street and so on; that his reputation is approximately $250,000.

And thereupon

ROBERT RISLEY,

being first duly sworn, testified for and in behalf of the plaintiff as follows:

Direct Examination

By Mr. Hellenthal:

My name is Robert Risley. I run my own vulcanizing shop. I know Frank Rowley; have known him since about 1941. I used to live next door to him in the Matanuska Valley and have been closely associated with him in Anchorage. We both belong to the same lodge. I know his habits as to industry. He has always been a good hard worker. I know his drinking habits. He possibly takes a drink occasionally. I would classify him as to drinking habits as not bad. [115]

(Testimony of Robert Risley.)

Cross-Examination

By Mr. Grigsby:

I am a brother lodge member with Mr. Rowley. That is the Moose Lodge. I know Mr. Richards who was on the stand a few minutes ago, R. S. Richards; he is also a brother Moose, and Mr. Dyer who was just on the stand is also a brother Moose.

Further Direct Examination

By Mr. Hellenthal:

I know about this Mt. View distributing plant that Mr. Rowley has. I know that he has worked hard in getting it organized, but through circumstances he is unable to continue. He has two diesel plants. The completion of his distributing system was interrupted at the time of his injury. Off hand I do not know how many customers Mr. Rowley had lined up for his distributing system, but I believe every resident in Mt. View community was going to secure power from him.

Cross-Examination

By Mr. Grigsby:

I live there in Mt. View myself.

And, thereupon

HUGH DAUGHERTY

being first duly sworn, testified for and in behalf of the plaintiff as follows:

Direct Examination

By Mr. Hellenthal:

My name is Hugh Daugherty. I am an agent for the New York Life Insurance Company. I have been in the business approximately ten years. I have taken several courses that my company offers and correspondence courses in insurance. I am familiar with tables of expectancy and annuity tables. I have had a great deal of experience in actuarian data and in gathering it and interpreting it. The life expectancy of a man aged 41 years is 27½ years. I get that information from the American Experience Table of Mortality used by all the major insurance companies in figuring expectancy. I have that table with me. That data is in the lower right hand corner of page 231. This book is the New York Life Insurance Company rate book. That is a book that most insurance companies and insurance men have. It is the agents' table of all rates, experiences, mortalities, interest—it is the one book we use constantly in our work. It is the history of millions of policy holders throughout the United States.

Q. Now, Mr. Daugherty, based upon the actuarian tables and the annuity tables and the ex-

(Testimony of Hugh Daugherty.)

pectancy tables and the combined expectancy tables and annuity tables found in the book that you have just referred to, how much would it cost a man 41 years old to buy an annuity policy—or rather, let me rephrase that; What is the present value of an annuity policy that will bring $400.00 a month to a man aged 41 years, for the rest of his life?

Mr. Curry: We object, if the Court please, immaterial, and there are also many other factors that enter into such a situation—the cost of insurance—we don't think that it's a fair basis for the issue here.

Mr. Hellenthal: Again the United States Supreme Court follows the mortality tables and the actuarian tables and the expectancy tables in determining the present value of the loss of future earnings of a man injured in an accident or injured by the violent actions of some other individual. I have the cases, your Honor, if you desire to see them.

Mr. Grigsby: Your Honor, the objection wasn't as to the competency entirely, but the question is, "for the rest of a man's life" and there is no evidence in the case that says that this man can earn $400, or could have if he wasn't injured, for the rest of his life. That was his earning capacity at the age of 41 years. There is nothing in these tables that pertain to how long he can [117] *that* from which any inference can be drawn that he will continue to earn it in extreme old age—80 or 90 or 100 years old. That hasn't anything to do with the measure of damages here in this case.

(Testimony of Hugh Daugherty.)

Mr. Hellenthal: Mr. Daugherty testified he had the combined life expectancy and annuity tables and I am prepared to bring decisions exactly in point with the United States Supreme Court holding this rule of damages is proper, and that such evidence, although not conclusive, is very, very valuable.

The Court: Of course, the American Tables of Mortality are universally received in evidence in every court for what they show. How far we can go upon—or how far any decision can be based upon the testimony sought to be elicited by the last question is a thing I am not able to answer now, but in order to speed the trial and get the evidence before the Court in the shortest possible time the objection will be overruled and the witness allowed to answer. Pro forma ruling will be given. You may proceed.

Mr. Hellenthal: What is the present value of an annuity which will bring $400 a month to an individual 41 years old, based upon his life expectancy and upon the annuity tables and the interest tables that you have in your guide?

A. All right: $400 a month based on age 41 for the balance of a man's life is $122,892. That means that if that sum of money were given to ours, or to any annuity company like ours, that the annuitant—the person receiving the money—would receive $400 for the balance of their natural lives. That figure is everything considered—present value of the annuity.

(Testimony of Hugh Daugherty.)

The Court: In other words, as I understand, in order to guarantee to pay a man $400 for the remainder of his natural life, if that man is in good health, we will say, at the age of 41, your company would require to have paid into it $122,892?

Witness: That is correct.

Witness (continuing): [118]

That is an average man. That is based on extensive tables and facts that have been gathered over a period of many years by insurance companies.

To bring $200 for the rest of a man's life, age 41, the present value of an annuity is simply a mathematical equivalent; it would be simply half of the figure, or $61,446. To bring $300 a month, it would be $92,169; $100 a month would cost $30,723. It is difficult to answer whether insurance companies make a little money on these annuities. If you are speaking of the agent, yes. The average agent's commission on the sale of a $122,000 annuity policy —you are asking what would the agent—myself, for instance—get for placing such a contract and receiving that money? It will vary. I don't believe it would go under half of 1% and if an agent received 2% of a sum like that, I would say that would be the ceiling in commission for him—somewhere between a half of 1% and 2%. I would answer that the profit on that $122,000 would be a very small amount, either for the salesman or the insurance company.

(Testimony of Hugh Daugherty.)

It is a very hard question to answer yes or no, whether there are cheaper annuity policies than those sold by the New York Life Insurance Company. If there would be a difference in rate, it might vary as much as 1% on the total cost, which is very small, but the variance would be very slight.

Mr. Hellenthal: Now, Mr. Daugherty, I would like to have this book and I offer it in evidence, subject to objection by the defense.

The Court: Is there objection?

Mr. Grigsby: We have no objection to the Court referring to it if he finds it material.

The Court: Well, it may be admitted, then——"

(Book referred to in testimony of witness admitted in evidence and marked Plaintiff's Exhibit No. 127.)

Mr. Hellenthal: Now, Mr. Daugherty, could a man who had suffered a compound, compressed, depressed fracture of the skull obtain life insurance?

Mr. Curry: We object, if the Court please. The witness hasn't qualified yet as any expert to pass upon the subject; and it is immaterial.

The Court: Objection overruled. [119]

Witness: I would answer that "No," that there would be no possibility of that man obtaining insurance.

And, thereupon,

ROBERT RISLEY

having been heretofore duly sworn, resumed the stand and further testified as follows in behalf of the plaintiff:

Redirect Examination

By Mr. Hellenthal:

I am a friend of Mr. Rowley; a pretty good friend. I have seen him on an average of two or three times a week for the last couple of years and have spent much time with him on those occasions.

Mr. Hellenthal: Mr. Risley, have you noticed any change in Mr. Rowley since this injury that he received on the 30th of July?

Mr. Cuddy: We object, if the Court please. The witness has not shown that he is qualified to judge along such lines and the question too broad.

The Court: Overruled.

Witness: Yes sir, I have. I have noticed that whenever I am speaking to him, sometimes I have to repeat either a question or a statement that I have made. I cannot recall having to do that before this injury. He doesn't seem to be the same.

And, thereupon

A. H. DYER

having been heretofore duly sworn, resumed the stand and further testified for and in behalf of the plaintiff as follows:

Redirect Examination

By Mr. Hellenthal:

I am a pretty good friend of Frank Rowley's. Until the time of this injury, I would say I met him two or three times a week. Since this injury, I have observed mental traits in Mr. Rowley that were not present before the time of the injury. I don't know just how to explain it, but his mind seems preoccupied. [120] He is not as alert—as quick. If spoken to, sometimes he hesitates for a little before he answers, the same as if he didn't hear it. I have only observed that lack of alertness. Just the other day I walked up the street with him and I noticed that he didn't pay the proper attention to traffic—that he stepped in front of a car, and it was quite evident that the car was there. It was easy to see; and I at that time noticed it.

And, thereupon

MRS. FRANK ROWLEY

being first duly sworn, testified for and in behalf of the plaintiff as follows:

Direct Examination

By Mr. Hellenthal:

My name is Vena Rowley. I am married to Frank Rowley. He is 41 years old. At the hospital, following Mr. Rowley's injury, I observed mucus coming from his nose. I saw there was mucus and blood from both his nose and throat. That condition persisted three or four days after the injury, if I remember rightly. I saw it. I spent nearly all my time at the hospital during those three or four days. When there was no special nurse I stayed during those hours. I remember him signing something but I don't remember was it was. I did not see it. With regard to Mr. Rowley's mental state being different than it was prior to this injury, I notice he responds more slowly when he is spoken to. He seems to take longer thinking, any answer to the children's questions—he seems to be hard of hearing. I did not notice those things before the injury. He just seems slower and harder to draw his attention.

And, thereupon, over objection as to materiality, it was stipulated that the plaintiff made a will three days after the injury.

Mr. Hellenthal: The plaintiff rests.

And, thereupon, [121]

L. McGEE

being first duly sworn, testified for and in behalf of the defendant as follows:

Direct Examination

By Mr. Grigsby:

My name is L. McGee—Lanius McGee. (McGee is shown plaintiff's Exhibit No. 127, being a real and chattel mortgage from the defendant Z. E. Eagleston to witness, dated the 4th day of November, 1946, and being a mortgage for $48,000 on the real and personal property listed in the mortgage.)

Witness continuing:

I loaned that sum to Mr. Eagleston on that date. I gave him checks representing cash.

Q. Will you look over that list of real property? The real property listed under the head of real property?

A. Yes, I understand. Yes sir.

Witness continuing:

I have been in Anchorage about 19 or 20 years. I am, to some extent, familiar with the value of real estate. I had seen that property and know where it is. With reference to the chattels listed, I am not familiar with that. I am not too familiar with that, no. When I made that loan, I did not make it as a business loan, fixing the amount that I was willing to loan entirely on the value of the property. I took into consideration the fact that

(Testimony of L. McGee.)

I had loaned Mr. Eagleston money before. Without security. On one occasion with security also. I had not loaned him large amounts without security, as compared to this amount. The most he has owed me in the last couple of years without security—his indebtedness to me for cash given him without security, except his personal note, has been in the neighborhood of $17,000. In making this loan, I took the fact into consideration that he would have to work it out of the junk and the supplies, etc., that he has [122] bought there. I might state that the $17,000 was loaned when he purchased Anderson's Camp, which was a lot of junk and I still understand is out there yet. In a general way, the value of that junk will be determined by what he can get out of it by selling it. That is by, you might say, farming it out, or waiting until a customer comes along and wants to buy it. I don't know what I would pay for it in one lump sum right quick. That is a pretty hard question. I would not loan very much money—not a substantial sum of money on all that junk outside that real estate. Not if I had to handle it. I would not loan very much.

Mr. Grigsby: Is that personal property now—where it lays now—without regard to the bestowal of it by a man familiar with that business—what would you consider it worth, as it lays there today?

A. That is all the pieces of property that's included in this mortgage, you mean?

(Testimony of L. McGee.)

Q. No, all the junk—all the personal property.

A. Not the real estate?

Q. All right, take it all.

A. Everything right straight through?

Q. Yes.

A. What you mean is put it up for auction—under the hammer, on sale, and sell it right quick?

Q. Market value.

A. I would figure it was worth around $35,000.

And, thereupon

Z. E. EAGLESTON

being first duly sworn, testified in his own behalf as follows:

Direct Examination

By Mr. Grigsby:

My name is Zura Emmett Eagleston. When I first came to Alaska, I was sent up by the Seattle Star. I came up on the Coast [123] Guard Cutter, Samuel D. Ingraham; left Seattle on the 20th day August, 1939; arrived in Ketchikan on the 22nd of August. I stayed there until just before the holidays and returned to Seattle. I worked for the Star the rest of that winter. The next spring, they reorganized. I worked for the Star in regard to circulation, soliciting of advertisement, sending in feature articles or news as I could obtain it. I left Seattle the latter part of June and arrived in Alaska on June 27, 1940. I had one ten dollar

(Testimony of Z. E. Eagleston.)

bill when I arrived in Seward. That was my total worth in the world. I have lived here ever since. I arrived here with $3.15, stopped at the Parsons Hotel; stayed there for a matter of a few days; was unable to do the business for the Star because they said the mail service was too slow, they couldn't get the news like they wanted it. And business conditions at that time—I became in debt. I even had to leave my bags with Mrs. Parsons after incurring——

Q. All right now, after that what employment did you engage in? What was your next employment?

A. On July 25 I started to work out at the Base. I worked out there from then until some time in September. I took sick with the flu. During that time they had had a little political trouble, or a little trouble out there, and they had changed the general superintendent, and a fellow—a consulting engineer was placed in charge, and in reorganizing I was placed around in another job—or I was going to be placed in another job. I took sick with the flu, come in and Dr. Howard Romig doctored me.

Q. What employment did you engage in at the Base?

A. I started in, for the two first days they put me on a pick and shovel—gravel pit. Then they put me over as a checking clerk, and from that to a material clerk.

(Testimony of Z. E. Eagleston.)

Q. All right, you didn't return to the Base to work after you were sick?

A. No, sir. When I got better I got in touch with [124] Mr. Corey trying to get my check. At that time I was—oh—between $300 and $400 in debt. I run behind on doctor bills and all and I got in touch with Mr. Corey and he told me he wished I would come back out, they had a place they could use me. I met Butler, who was acting as assistant superintendent, and he told me if I would come out in the carpenter division he would try to put me in as a foreman. However, I found myself so much in debt, I started in by collecting junk. My first experience was down where the freight depot now stands. It had been the city dump. I went over this pile and worked it over, gathered it up by the sackful; laid it under the observation of a building that was down there at —or some parties that were working down there at the time, and left it there; and then I would haul it up and——

Q. Did you gather it personally—with your own hands?

A. I gathered it hand by hand and filled it in gunny sacks. And then I went down and worked along what is now the government dock. They had a warehouse fire—the railroad had—and they had hauled it over and throwed it there. Amongst it was quite a bit of copper and brass and some lead. I went and gathered it up. One day while I was working there one of the watchmen came along

(Testimony of Z. E. Eagleston.)

and asked me if I had permission to work on the railroad property. I told him no, that I thought it was all right to just go ahead—it was junk and useless. And while he agreed with me, he suggested I go and see some official. That was the first time I ever met Colonel Ohlson. I judge this to be along sometime in October—latter part of October. And during the conversation with Colonel Ohlson he asked me if I would be interested in getting some copper wire. I told him I was always interested in anything that pertained to junk. So he told me that there had been a power line built from Sutton to Eska—a matter of a little over three miles. The Navy had built it after the last war. Their steam plant was up at Eska and they run this power down and had a washer [125] at Sutton and at Eska. It was for coal from the Chickaloon. I gathered all the junk I had and shipped it away at that time. I went up and took a look at this wire, phoned him and he told me to go ahead. This was a No. 4 wire. I would say it is approximately three-eighths of an inch in thickness. This fell down in some pieces—had been down for many years. I would take and lift it off the poles, knock the old poles down there they happened to be standing or leaning, get it off the poles, tear it up from the grass and roll it by hand by twisting it over my arm and getting it in piles. Then I conceived the idea of building sort of a windlass. I had cut it in various lengths and lay it in the various piles, and when the first snow would come along,

(Testimony of Z. E. Eagleston.)

just before Thanksgiving, I gathered this up and hauled it up by dog sled. That was my first experience in what they call mushing in Alaska. I ran across a native boy and he had three big dogs he hooked up to a sled and we would haul this out two or three hundred pounds at a time to the railroad. From there I shipped it down to Anchorage, estimated it, and then sent it to Seward and to Seattle, to the American Smelting and Refining Company. I think they still have my records.

Q. After that experience what business did you continue in for the next period?

A. I got through with that just before Christmast time, and then after Christmas I went back up to the Matanuska project, to Palmer. The co-op had some batteries—old radiators, some aluminum; also a fellow by the name of Graham had had a garage, and they had their old dump. I went out and worked that over, spent over a month's time—stopped there at the boarding house—gathering it up and shipping it. While I was there I noticed they had considerable stuff on hand that they formerly—in the project—they had shipped, such as electrical supplies and also some plumbing supplies. I bought several of those faucets— of which I have since thought of—and bought them at old [126] brass figures, I think a matter of three and a half, four cents, a pound, stuff that would be worth nearly that many dollars a pound now. I gathered this up, and among the rest they had three or four hundred old bronze window screens—new—that had

(Testimony of Z. E. Eagleston.)

been originally for Juneau and from Juneau they had been shipped to Fairbanks, and sent back down —rejected in each place. From there they had been sent back down to Palmer, he told me. I think I paid the sum of 20c apiece for them.

Q. Now, without going into too much detail, how long did you continue in the junk business?

A. I have been continuing, even to the present time.

Q. Well, before you went in any other business?

A. I continued that exclusively until approximately February 15, 1944.

Q. And then what did you do? That when you became connected with the Alta Club?

A. At that time I became connected with the Alta Club, and I—between the Alta Club and the junk business I have been engaged in both of them, taking care of the Alta Club and of the junk business since then. In that time I have bought the Anderson's Camp——

Q. Mr. Eagleston, you heard yesterday a number of witnesses testify that you were reputed to be a man of considerable wealth, and I believe two of the witnesses stated that you were reputed to be worth a quarter of a million dollars. Does that mortgage that you gave McGee on the 4th of November last include all your assets? Does that include all of your assets?

A. That includes practically everything I own except personal property such as clothing or something of that nature, yes sir.

(Testimony of Z. E. Eagleston.)

Q. Now, a large part of that property listed in that mortgage is personal property. I would like to have you take this—what would be your estimate, Mr. Eagleston, of the value of the security you have given in this mortgage, based on your familiarity with the different pieces of real estate, and of the chattels? [127] What is your estimate of the value of all—the total?

A. To me, or to a person——

Q. The market value, right today?

A. To sell it?

Q. Market value—real and personal property described in this mortgage—that is to sell it, of course?

A. Well, if it was put up and offered for sale today, and it was bid in at $60,000, I would think that I got an awful good price out of it.

Q. Now, what is the value of the real property? I will first mention Lots 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, and 11 of Block 6—26-C of the sub-division of the South one-half of Block 26 of the East Addition of the City of Anchorage. Are there any houses on that property?

A. There is on 11. The first 10 you named was bought in a lot from Mrs. Barber. Mrs. Sonia—her name used to be Mrs. Barber. The purchase price was $9000. I paid $5000 cash and there was a mortgage for $4000, but I have since sold Lot 1, 2 and 3 for $3500 to Orville Hoyt—or to Orville Jordan. Selling this was because the mortgage of $4000 still remained, plus interest, and McGee called

(Testimony of Z. E. Eagleston.)

my attention to it that he thought that was a fair price and that that mortgage should be paid off. So I paid that off by taking some other money—some cash—and paying with it.

Q. Now, Lot 11, Block 45; Is there a house on that?

A. Yes sir.

Q. What's that property worth?

A. Well, I would say that $4000 would be a very good price for it; in fact, that it would be well sold.

Q. All and the whole of Lot 9, Block 47; Is there a house on that?

A. Yes sir.

Q. What is that property worth?

A. I paid $1800 for it at the time I got it. At the time now—there is a hole dug in front of it—fixed the house up to live in. It is a place to do business on,—I would say around in the neighborhood of $5000. [128]

Q. And Lot 8 in Block 4-D of the Third Addition to the City of Anchorage; Is there a house on that?

A. There are two houses on that.

Q. What is that property worth?

A. It was—$7500 was paid for it.

Q. How long ago?

A. Sometime in '46—forepart of '46.

Q. Now what does this chattel property——

A. I might add I would like to get my $7500 back out of that. I don't think I made a very smart deal.

(Testimony of Z. E. Eagleston.)

Q. That is all the real property you own?

A. No, I have another place out on 11th and East H Place.

Q. Is that not listed here?

A. That's the one where Mr. Miles lived in for over a year without paying me any rent.

Q. That is not listed here?

A. That was supposed to be listed here because he asked me for every piece of property I owned, and he informed me when we was making the loan —I asked for $50,000—and he informed me the reason he was making the loan was—he didn't believe that the value was there, but that I had always kept my word and he had faith in my ability and thought that I would be able to repay it.

Q. All right now, we will get to the chattels. What do these chattels consist of, in a general way first?

A. Well, it is quite a collection.

Q. I will ask you, did you acquire the personal property in Anderson's Camp a year or two ago?

A. I bought it in October, 1945—the entire remains of Anderson's Camp.

Q. And where did you get that money.

A. I borrowed approximately $17,000 from L. McGee—sixteen thousand seven or eight hundred.

Q. And did you give him any security besides your note?

A. I gave him a note only.

Q. And that's part of this property? Now, will you tell in a general way——

(Testimony of Z. E. Eagleston.)

A. Just a minute. I think in that there—[129] I had give him a mortgage at one time for $7000, down where I live. That included the place—that's the one, Lot 11 in Block 45. That had considerable junk on it already for shipment at the time, and we figured the junk and stuff was around 2500, 3000 dollars worth—that and the car and all—and he gave me that. I mortgaged it for $7000. The rest of the 17,000 that I got—11,000 and something —was secured only by note.

Q. All right, now, I want to get the value of these chattels. In a general way, what does this chattel property consist of, Mr. Eagleston, by lumping it into the way you acquired it? Is there some of Anderson's Camp stock left?

A. There is a large portion of it—the largest portion.

Q. Now, what other—describe some other aggregation of property. Is there a merry-go-round?

A. Going back: I had to purchase Anderson's Camp. I had bought some buildings that the Government had for sale that used to be the Engineers' building—most of them. Amongst them was some quonset huts. All but one I think, was sold—each on a small profit. Some of them I made as low as only $25.00 on them. Others I made none to exceed $100. I wish I had them now.

Q. I am getting at the property mortgaged here, Mr. Eagleston. I want to get your estimate of the value of it. Now, it consists of what you got left of Anderson's Camp, and what else does it consist of?

(Testimony of Z. E. Eagleston.)

A. Out of these houses I got there was some little plumbing. I had to store it. I bought this other and then got Anderson's Camp because I had in mind I would like to put in a small amusement park, and I bought this Anderson's Camp and the buildings and moved on there, and then I got a merry-go-round for which I paid $1500, and it cost me over 1500 for freight getting it here. Then I got a loop-o-plane.

Q. What is that?

A. A loop-o-plane—it's a riding device [130] that consists of an upright with two arms to it. It has a basket on each arm that will hold four adults or six small people. And it turns——

Q. Is that for an amusement device?

A. Yes sir.

Q. The buildings referred to are the two buildings, each 20x120?

A. Were buildings moved over from near—purchased from the Government.

Q. Are those two buildings referred to 20 by 120?

A. That is right.

Q. And one Paciffc Hut, 16 x 36—is that a quonset hut?

A. That is a Pacific Hut.

Q. And one large dwelling house?

A. That is the one that sets on Lot 11.

Q. Now,

"Together with 1 Merry-go-round; 1 Double Loop-O-Plane; and all lumber and building materials located on the above described prop-

(Testimony of Z. E. Eagleston.)

erty; together with all merchandise of every kind and description contained in those certain buildings above described, and any stock, fixtures or equipment that may be hereafter acquired by the mortgagor herein; and

"All buildings located on Lot 11 in Block 45, on Lot 9 in Block 47, and on Lot 8 in Block 4-D of the Third Addition"——

What are those buildings?

A. How is that?

Q. What are those buildings? "All buildings located on Lot 11 in Block 45, on Lot 9 in Block 47, and on Lot 8 in Block 4-D of the Third Addition, as above described?"

A. The one on Lot 11, Block 45, is where I live—where this altercation took place.

Q. Yes, and the one on Lot 8, Block 4-D of the Third Addition?

A. That is the one that sets at 11th and East H Place. I acquired that by loaning money to two different owners. [131]

Q. Now, will you place an estimate on the value of these chattels, all together, as they lay now?

A. Well, the first one I estimate at approximately $5000, where I live.

Q. Now, I say the total of these chattels?

A. That will take me just a moment, Mr. Grigsby. 5000 and 5000 (writing). Does that include the one on Lot 11 of the East Addition—of Block 26-C? Perhaps, Mr. Grigsby, I can answer that this way——

(Testimony of Z. E. Eagleston.)

Q. The personal property listed there under the head of chattel——

The Court: It occurs to me that some of this property listed as personal property may be real property—a house attached to a lot.

Witness: Will probably be real property. I am asking Mr. Grigsby——

Mr. Grigsby: No, I believe this real property—listed as real property is real property and Mr. Eagleston doesn't own the buildings. He leased a piece of property to put them on; but look over your chattels—I think there is a complete list of chattels.

Witness: Please, your Honor, I think I can explain that in a way that could clear it up as to value. We have offered the entire eight lots, 1, 2 and 3, having been sold—we have offered 4 to 11, containing the said——

The Court: That is what block?

Witness: That is in Block 26-C.

The Court: Go ahead.

Witness: Including this black house, including the Pacific Hut, the two long buildings, the merry-go-round, the loop-o-plane, the contents from Anderson's Camp, what we purchased from the Post surplus property, or from the Surplus Property and Post Salvage Yard—in fact, lock, stock and barrel, we have offered it all for $50,000, which would leave 2000 besides this mortgage. That would leave unmortgaged, or in the clear, the house at 11th and East H, which I value at $5000, the one where

(Testimony of Z. E. Eagleston.)

I live, Lot 11 in Block 45 of the City of Anchorage, at another $5000, would make $10,000; and the one on Sixth Street, which is Lot 8, I believe, has a large and a small house on it, which I paid $7500 for and overpaid. I value it at approximately 6000 to 6500. So that would make a total—leave me with a total of approximately 16,500, plus the 2000, or remaining part of 2000. In other words, at the present time, under a forced sale, I don't believe that I am worth over $18,000, besides cash.

Mr Grigsby: At the time you made this mortgage did you endeavor to borrow money anywhere else than from McGee on this property.

A. Yes sir. The Bank of Alaska told me they didn't care to loan money out of town. I borrowed this here in November. I had been trying to borrow it before then. My trial was coming up——

Q. Just answer the question. We will get to that. And where else besides the Bank of Alaska?

A. I tried to borrow from the First National. I talked to Mr. Cuddy. He told be their limit was $25,000 and that he wasn't interested in making a loan on my propery at all.

Q. Now, will you describe what this you mentioned as surplus property consists of so the Court will know what it is?

A. Mr. Grigsby, when I mentioned Surplus Property—the name of the institution that handles it out there—I didn't intend to refer to anything I had as surplus property.

(Testimony of Z. E. Eagleston.)

Q. No, certainly not, but——

A. What we have out there we have what we term as salvage.

Q. Yes, yes, that is what I want you to explain.

A. That consists of various things. As an example: The last bunch we bought from the Post Salvage yard. It seems there is a [133] distinguishing difference. If anything is used by the Army and it is broken up, or seemingly beyond repair—couldn't be sold for to re-use in the condition it is in—it goes to the Post salvage yard. If it is usable again it goes to Surplus Property. Now, the last bunch that I bought was 52 some odd dollars worth——

Q. Is that salvage or surplus property?

A. That come from the Post salvage yard.

Q. Yes, all right. Now, will you tell the Court what that is? I don't know what it is, and the Court doesn't know. I want you to testify to what it is.

A. May I make a reference to a list that I have here? This is incomplete, but it's—well, there is various lots from 21-gallon alum tanks, battery jars, scrap steel; it says aircraft parts, huts listed in three different bunches, scrap steel and engine parts including gaskets, more scrap metal, scrap steel, safety belts, 39-gallon tanks and 10-gallon tanks—those are sort of rubberized—used. Here amongst the rest we have some cable, aluminum in boxes, engine stands, radio receiver, OD clothing, rags, parkas, Artic jackets, wool sox, pillows.

(Testimony of Z. E. Eagleston.)

Amongst the rest there are three things that are outstanding in my mind right now. One is 37,000 pounds of—they have here as Chloride lime, but the label says "chlorinated." At the time we got them it was represented to me by a fellow that looked at it—says "That is chlorine lime" for which we purchased it, and I thought I might be able to dispose of it to the City to use in purifying the water. As soon as we found out it was chlorinated lime, that is an entirely different thing. That is in the powdered form. The other would have to be in liquid form. What I will do with this, or what I can use it for—I have got to work out a market for it.

Q. What about the rest of it?

A. Another thing, we have a bunch of 50-foot ladders we thought we could sell to the railroad yard but found they could not be transferred from one [134] government agency to another. The railroad could have got them for free if they had known about it. Then we have another, in the neighborhood of 300 to 350 feet long, a pile of scrap metal. This is estimated at 250 tons. Personally, I think there is more than that. That is aluminum, some copper, some brass, some manganese, iron. I have been told that some of them represented molybdenum. Amongst the rest I found some old radio parts throwed in that has a very light gold plate, very expensive at the time it was purchased, but I don't know that it will have value enough even to send it down and have the light gold plate taken off. I

(Testimony of Z. E. Eagleston.)

found two or three poles that were bronze that were used in radar equipment, but that will have to be stripped from its steel, iron and some other composite parts because they wouldn't pay for the shipping of it. Besides it has to be taken off to go into the furnace. In other words, this stuff will have to be all processed, which will require some expense, labor and supervision, and that is also governed by markets as to the proper time to ship that. I have some lead prepared and in barrels and this strike came on and now I don't know what the lead market is. I have gathered up batteries from practically every garage in town, and with these we have had the expense of labor for breaking them up and putting them in barrels. I have even got some old copper wire from the city in time past. I have got old aluminum from the airports and that caused me to believe that we can take and process it, and I still think it can be processed, but whoever does it will have to use some management and supervision, because the average laborer couldn't go in there—he wouldn't know just what it is. In this junk business, Mr. Grigsby, it requires some years experience and I have found out that even I, after the many years I have put into it, there is a lot of it that I don't know. [135]

Q. Did you offer for sale recently all this—what you term as "junk" in——

A. You mean the salvage yard? Yes sir. That constituted of the eight lots, all this stuff—you see, in Anderson's Camp we tore the building down

(Testimony of Z. E. Eagleston.)

and a lot of it was salvage material. A lot of the lumber, the better part, has been sold, for what we could get out of it. We lost a lot in taking it down, in taking the floor up. We have some of that flooring left. We have some lumber from a scrap lumber yard out at the Post salvage yard. We have various old metals and stuff.

Q. Now, Mr. Eagleston——

The Court: Pardon me. Did you mention molybdenum?

Witness: We have some there they tell me they have used that has molybdenum on it, and some is stainless steel.

The Court: The molybdenum is mixed with other metals?

Witness: Yes, and so is the stainless steel.

Mr. Grigsby: Did you endeavor to sell this recently?

A. Yes sir.

Q. What price did you put on it?

A. $50,000.

Q. Were you able to get it?

A. No, we haven't been able to sell it yet.

Q. How much are you in on it yet, hauling and everything—purchase price?

A. We haven't finished hauling it all.

Q. How much have you in it at the present time?

A. I have at least 60 or 70 thousand dollars invested in that——

(Testimony of Z. E. Eagleston.)

Q. Now, what does the value of——

A. In taking and processing it and shipping it, and trying to get the merry-go-round and the other —you see, when we got the merry-go-round it wasn't as represented. We have to repair it. We have done some repair on it and the loop-o-plane, and we haven't been able to get electricity to run either one of them and so we have got no revenue back from them. [136]

Q. You said when you estimated the value of your property 21 or 22 thousand dollars is exclusive of cash. How much cash have you?

Court: $18,000 he said.

Mr. Grigsby: Or 18,000. How much cash?

A. There is $48,000——

Q. Just answer the question.

A. A little over 30,000.

Mr. Grigsby: I think that's all.

Cross-Examination

By Mr. Hellenthal:

Q. Do you have any other cash put away in Seattle? A. Not as much as one penny.

Q. Do you own the Alta Club? A. No, sir.

Q. What connection do you have with the Alta Club? A. I am there as a trustee.

Q. Oh, for nothing?

A. No, I get an income from it.

Q. How much did you pay for those refrigerators you bought from the Army—from the Surplus Property people?

(Testimony of Z. E. Eagleston.)

A. Paid a little 8,000 for them, and a little over 4,000 to get them here and get them set up.

Q. How much did you pay for that lumber you bought in the salvage yard?

A. That was put in in the bunch we bought. I think we spent out a total of seven or eight thousand for the entire lot. That can be verified from their records.

Q. I believe you ran an ad last week in the paper offering your property for $50,000. Did you make some indirect mention of that ad when you said your property was offered for $50,000?

A. Frankly, I didn't know that there was an ad run. I didn't run it. I have offered it for that. Mrs. Dunkel and Mr. Busey have asked me what I would take, and if there has been any ad run they have undoubtedly put it in.

Q. Wasn't that for the Savings Dollar Store alone?

A. No sir, that includes the entire property.

Q. And that said let no one come with less than $50,000, or something to that effect, did it not?

A. I have never seen the ad. I didn't know there was even one put in.

Redirect Examination

By Mr. Grigsby:

Q. Mr. Eagleston, are you willing that a commission of appraisers be selected, appointed by the Court, to inspect and appraise all your property, real and personal? A. Yes sir.

(Testimony of Z. E. Eagleston.)

Recross-Examination

By Mr. Hellenthal:

Q. Mr. Eagleston, did I understand you to say that the property on which this—what you refer to as an argument, I believe—where this incident occurred, was worth $5000?

A. I figure it at 5000, yes sir.

Q. Is that the property mentioned in an ad in the Anchorage Times on the 7th of December as full lot in business district with basement excavated for large building? Incidentally, is there a basement excavated? A. There is.

Q. Now, is that the lot mentioned in the Anchorage Times as "full lot in business district with basement excavated for large building. Dwelling house already on property?" There is a dwelling house on it? A. Yes, I dwell there.

Q. "First offer of $11,000 takes it?"

A. How is that?

Q. "First offer of $11,000 takes it?"

A. Well, to answer your question fully, I never knew there was such an ad put in, but I will certainly say he will get it for that. I don't know by whose authority it was put in.

Q. Now, does that evidently refer to your property—that ad? A. That I don't know.

Q. Now, Mr. Eagleston, on the 7th of December there was another ad I want to ask you about:

(Testimony of Z. E. Eagleston.)

"Flourishing business, strategically located, but don't bother to inquire unless you have $50,000. Blue 105 for appointment." Does that refer to your Savings Dollar Store?

A. That I don't know. I know nothing [138] about that ad. Perhaps by phoning—what is it, Blue 105?

Q. That is Mr. Busey's phone. Do you know him?

A. I know Mr. Busey. If he told me he got me $50,000 for that entire yard——

Q. What did you say about this other property?

A. I didn't know we had ever mentioned that. In fact, I signed no listings with Mr. Busey whatever. I didn't know he had it listed.

Q. Do you deposit the proceeds from the Alta Club every morning in the bank? A. No sir.

Q. What money have you been bringing to the bank recently, if any?

A. You mean for deposit?

Q. No, to exchange for bills, for instance?

A. I don't know.

Q. What money is that?

A. I don't understand your question.

Q. Have you been bringing large amounts of money to the First National Bank recently in the mornings and exchanging it for large bills, say $500 and $1,000 bills?

A. I haven't received any $500 or $1,000 bills, but I have brought some money in there. This

(Testimony of Z. E. Eagleston.)
$30,000 from my mortgage I brought in and got changed to other bills for convenience purposes. I might add to that, when I purchase from the Surplus Property or from the other, I deal in cash and I always take out large bills. When I bought the refrigerators it was done that same way.

Mr. Hellenthal: Nothing further.

Mr. Grigsby: That's all.

The Court: That is all, Mr. Eagleston. Is there any further testimony?

Mr. Grigsby: We rest.

The Court: Any rebuttal testimony?

Mr. Hellenthal: Nothing further. [139]

And thereupon, both sides having rested, the case was submitted to the Court, and thereafter, to-wit on the 20th day of December, 1946, the Court rendered its oral decision, finding for the plaintiff and against the defendant, and awarding actual and compensatory damages to the plaintiff in the sum of $37,000.00.

And thereafter, on the 23rd day of December, 1946, the defendant filed his motion for a new trial, which was on the 27th day of December, 1946, denied by the Court, to which ruling defendant excepted and exception was allowed; and thereafter on said day the Court signed and filed its Findings of Fact, Conclusions of Law, and Judg-

ment to which defendant excepted and his exceptions were allowed, and which exceptions were as follows:

(Omitting title of case.)

To the Findings of Fact made and entered herein on the 27th day of December, 1946, the defendant excepts as follows:

To Finding of Fact No. I—on the ground there was insufficient evidence introduced on the trial on which to base said finding.

Defendant excepts to Finding of Fact No. II, on the ground that there was insufficient evidence introduced at the trial to support said finding.

Defendant excepts to Finding of Fact No. III, wherein the Court finds that plaintiff has suffered damage in the amount of Thirty-Seven Thousand Dollars ($37,000.00), on the ground that there is insufficient evidence introduced at the trial of said action to support such finding, and on the ground that such finding was based partially upon improper evidence as detailed in paragraph IV of said Findings of Fact.

To the Conclusions of Law filed herein on the 27th day of December, 1946, defendant excepts on the ground that said Conclusions of Law wherein and whereby the Court found that plaintiff was entitled to judgment against the defendant in the sum of $37,000.00, and certain interest are based on erroneous Findings of Fact not supported by the evidence in the case.

Defendant excepts to the judgment rendered herein on the 27th [140] day of December, 1946, wherein and whereby the plaintiff was awarded judgment against the defendant in the sum of Thirty-seven Thousand Dollars ($37,000.00), with certain interest and costs on the ground that said judgment is excessive and not justified by the evidence introduced on the trial of said action.

GEORGE B. GRIGSBY,
Attorney for Defendant

The foregoing exceptions are hereby allowed this 13th day of March, 1947.

ANTHONY J. DIMOND,
District Judge

And thereafter on March 14th, 1947, the defendant was granted by the Court 60 days within which to serve, file and present his Bill of Exceptions on Appeal in said cause.

And thereafter on May 13th, 1947, served, filed and presented to the Court for settlement this his said Bill of Exceptions in said cause.

The complete transcript of the testimony and evidence given on the trial of the criminal case, entitled "United States of America vs. Z. E. Eagleston, is hereunto attached and made a part of this Bill of Exceptions.

For as much as the matters and things hereinabove set forth do not fully appear of record, the said defendant, Z. E. Eagleston, tenders and presents the foregoing as his Bill of Exceptions in

said cause and prays that the same be settled, allowed, signed and made a part of the record in said cause, pursuant to law in such cases.

Dated at Anchorage, Alaska, this 12th day of May, 1947.

/s/ GEORGE B. GRIGSBY,
Attorney for Defendant

Receipt is hereby acknowledged of copy of proposed Bill of Exceptions in the above entitled action.

May 12th, 1947.

/s/ JOHN S. HELLENTHAL,
Attorney for Plaintiff

In the District Court for the Territory of Alaska
Third Division

No. A-4239

FRANK ROWLEY,

Plaintiff,

vs.

Z. E. EAGLESTON,

Defendant.

ORDER SETTLING BILL OF EXCEPTIONS

The foregoing Bill of Exceptions having been filed and presented for settlement within the time allowed by law and the rules of Court, and having been examined by me and found to be a true and

accurate statement of all the evidence introduced and proceedings had in the trial of said cause in condensed and narrative form, except in instances where for a full understanding of the issues the proceeding and testimony has been set out verbatim and by question and answer, and said Bill of Exceptions having been found by me and agreed upon by counsel for plaintiff and defendant to be true and correct, it is, therefore,

Ordered, that said Bill of Exceptions be, and the same hereby is, approved and settled as a bill of exceptions upon the appeal of the defendant to the United States Circuit Court of Appeals for the Ninth Circuit, and it is further,

Ordered, that this order shall be deemed and taken as a certificate of the undersigned judge of this court who presided at the hearing of the said cause and before whom all the evidence in said cause was given, that the said Bill of Exceptions contains a condensed statement, in narrative form and by question and answer, of all evidence given in said cause upon which the Findings of Fact, Conclusions of Law, and Judgment of the Court are based.

Done by the Court and ordered entered this 23rd day of September, 1947.

/s/ ANTHONY J. DIMOND,
District Judge

[Endorsed]: Filed Sept. 23, 1947. [142]

[Title of District Court and Cause.]

SUPPLEMENTAL PRAECIPE FOR TRANSCRIPT OF RECORD

To the Clerk of the District Court, Third Division Alaska:

You are hereby requested to include in the transcript of record on appeal in the above entitled cause the following additional papers:

1. Minute Order, Oct. 20th, 1947, extending time to docket Record on Appeal.

2. Minute Order, Nov. 21st, 1947, extending time to docket Record on Appeal.

3. This supplemental praecipe.

/s/ GEORGE B. GRIGSBY,
Attorney for Defendant

Service admitted this 21st day of November, 1947.

/s/ JOHN S. HELLENTHAL,
Attorney for Plaintiff and Appelle

By /s/ P. CHAMBERLIN

[Title of District Court and Cause.]

Minute Order, Oct. 20, 1947

EXTENDING TIME TO FILE AND DOCKET CASE WITH CIRCUIT COURT OF APPEALS

Now at this time on motion of George B. Grigsby, counsel for defendant,

It is ordered that the defendant in cause No. A-4239, entitled Frank Rowley, plaintiff, versus Z. E. Eagleston, defendant, be, and he is hereby, granted an additional thirty days within which to file and docket case in Circuit Court of Appeals.

Entered Court Journal No. G-15, Page No. 181. Oct. 20, 1947. [452]

[Title of District Court and Cause.]

Minute Order, Nov. 21, 1947

EXTENDING TIME

Now at this time upon motion of George B. Grigsby, counsel for defendant.

It is ordered that the defendant in cause No. A-4239, entitled Frank Rowley, plaintiff, versus Z. E. Eagleston, defendant, be, and he is hereby granted to and including December 5, 1947, to docket cause with Circuit Court of Appeals.

Entered Court Journal No. G-15, Page No. 278. Nov. 21, 1947. [453]

[Title of District Court and Cause.]

COUNTER-PRAECIPE

To the Clerk of the District Court for the Territory of Alaska, Third Judicial Division:

You are hereby requested to make transcript of record in the above entitled action to be filed in the United States Circuit Court of Appeals for the Ninth Circuit, pursuant to an appeal taken in said cause, and to include in said transcript the following papers of record in said cause not heretofore requested transcribed by defendant in said cause:

1. Pages Numbered 534 to 540 inclusive, subentitled "Fracture of the Skull," of "A Textbook of Clinical Neurology, with an Introduction on the History of Neurology," by Israel S. Wechsler, M. D., Fifth Edition, Revised, 1944, W. B. Saunders Company—All filed in the records of the Court on January 14, 1947, and referred to by District Court in Findings of Fact and Conclusions of Law.

2. Order dated 29 October, 1947, re Exhibit 128 and Exhibits 100-113 inclusive and 114 to 123 inclusive.

3. This Counter-Praecipe.

/s/ JOHN S. HELLENTHAL,
Attorney for Plaintiff-
Appellee

Service admitted this 29th day of October, 1947.

/s/ GEORGE B. GRIGSBY,
Attorney for Defendant-
Appellant. [454]

"A Textbook of Clinical Neurology" with an Introduction to the History of Neurology, by Israel S. Wechsler, M.D., Fifth Edition, Revised, published by W. B. Saunders Company, Philadelphia and London, 1944.

Page 534—"Fracture of the Skull.

"Fracture of the skull is accompanied by loss of consciousness in more than 95 per cent of cases. If there is no tearing of the meninges, bleeding within the skull, or compression of the brain, the coma is not deep and consciousness is regained within a few minutes. If there is edema of the brain, with marked compression, particularly on the medulla, the coma is profound and may last hours or days. The pulse is slow, breathing is deep, stertorous or Cheyne-Stokes, the face is flushed, the extremities cold, the pupils at first contracted, later dilated, and fixed. The latter may be unequal, the dilated pupil generally being on the side of the cerebral injury. Should the cerebral compression increase, the patient may die within an hour or linger on for several days without regaining consciousness. He may come out of the coma for a time, then relapse and die of cerebral compression from hemorrhage or edema. The danger signs are deepening of the coma, loss of vesical and rectal control, rise of temperature, fall of blood pressure, and increase in respiratory and pulse rate. In the absence of infection, fever is, as a rule, absent.

"Generally, there is a hematoma over the site of the injury, and sooner or later echymoses about the

eyes, mastoid or back of the neck appear. The latter are often present in fracture of the base of the skull. In such cases, too, one or more of the cranial nerves may be paralyzed. Paralysis of the face is not uncommon if the fracture passes through the petrous pyramid. The cochlear nerve may also be affected and give rise to temporary or permanent deafness. The sixth nerve is not infrequently involved, resulting in internal strabismus and diplopia. Retinal hemorrhages are occasionally present. Fracture through the optic foramen may lead to unilateral optic atrophy and blindness. Fracture of the vault is generally unaccompanied by cranial nerve palsies. Should there be local hemorrhage or focal injury to the brain, irritative [455] signs appear in the form of jacksonian or generalized convulsions, followed by monoplegia or hemiplegia. The local signs and symptoms, such as aphasis, hemianopsia, sensory disturbances, ataxia, etc. (discussed under Focal Diagnosis), differ in no way from those caused by any other lesion. Occasionally there is papilledema, possibly more marked on the side of the injury.

"As the patient recovers consciousness he may vomit. During the gradual recovery there is still clouding of consciousness, and after this is regained there may be complete amnesia. Occasionally one observes delirium or a psychotic state, such as is seen in alcoholism or general paresis, lasting from a few hours to several days or even weeks. In the case of frontal lobe lesions, besides the possibility of psychotic manifestations, there may be moria or

Witzelsucht, apathy, and akinesia. Generally, the patient complains of severe headache, dizziness, and ringing in the ears. If a lumbar puncture is performed the fluid may come out under increased pressure and be mixed with blood in the case of hemorrhage into the subarachnoid space.

"Aside from the possibility of progressive meningeal hemorrhage, which will be discussed separately, infection carried in through the fractured skull may result in pyogenic meningitis (q.v.), in the formation of an epidural abscess or deep-seated abscess of the brain. Should ominous rigidity of the neck set in, the headaches be very severe, persistent, and localized, or stupor increase, the possibility of these complications must be thought of. But while all these complications may set in early they not infrequently occur weeks or even months after the injury. Traumatic encephalopathy may also be mentioned as a possibility. In many cases there is a proliferative gliosis secondary to the brain injury. Generally, the acute signs and symptoms recede, leaving behind residual manifestations.

"Besides the residual focal paralytic signs the patient often complains of persistent headache, pressure in the head, dizziness; noises in the ears, spots before the eyes, hypersensitiveness to light and sound, poverty [456] of memory, and general mental and physical fatigability. He may be drowsy or complain of insomnia. Glycosuria may follow fracture because of injury to the hypothalamic or interventricular regions (also the floor of the fourth ventricle). The pulse may be slow, the hands trem-

ulous, the reflexes hyperactive. The patient cannot concentrate his attention, and loses his energy; he feels the blood rushing to the head, suffers pain over the heart, is irritable, anxious, moody, or has outbreaks of anger. All or some of these manifestations may persist for a variable period of time; sometimes there are few or none. Pneumocephalus (accumulation of air within the cranial cavity) occasionally follows fracture through the sinuses or in other cases where the dura is ruptured. It is characterized essentially by headaches (signs of increased intracranial pressure) and sometimes by rhinorrhea.

"While it is difficult to establish a definite parallelism between the severity of the cerebral injury and the mental symptoms just enumerated, a great many patients who have sustained fractures of the skull show residual emotional and intellectual disturbances. Many have diminished capacity for work, as can be demonstrated by actual tests. Numerous investigators have studied under laboratory conditions the weakened "faculties" of soldiers who received head wounds during the war, and in many cases concluded that the defects could be fairly well correlated with the particular location of the brain injury. Thus, lengthened association time, easy mental fatigability, frequent errors, defective will or inhibition, and diminished power of attention were found in frontal lesions. Less marked but similar intellectual defects were also observed in temporoparietal injuries, while impaired ability in calculation was especially characteristic of occi-

pital lobe defects. Curiously, poverty of attention was found to be greater in occipital than frontal lobe lesions. In general, the higher psychic and intellectual functions were impaired to a greater extent in left-sided lesions of right-handed individuals; this was particularly true of frontal and parietal lobe injuries.

"In addition to the 'nervous' complaints, which are undoubtedly due [457] to organic brain changes, a number of hysterical symptoms may be engrafted. Desire for industrial or other compensation, the existence of personal conflicts for which the brain injury offers a compromise outlet, bad advice by lawyers or mismanagement by physicians are frequently the mainsprings of the psychogenic manifestations. Among these may be mentioned exaggerations of actual symptoms, unwillingness to cooperate, and resentfulness. Occasionally one observes hysterical paralyses and anesthesias, mutism, aphonia, stammering, tremors, twilight states, or attacks of unconsciousness, and even convulsions. Most of these symptoms generally appear some time following the injury, after a so-called "incubation period," and are to be observed in 10 to 15 per cent of cases.

"Traumatic epilepsy occurs in a number of persons who have sustained fractures of the skull. The estimates range as high as 30 per cent. This is undoubtedly an exaggeration. Five to 10 per cent is nearer the truth, and then it depends on the nature of the injury. While the convulsions may become manifest soon after the injury, they generally set

in a few months or years later. The epileptic attacks are most apt to occur in injuries in or near the motor cortex, but may follow lesions anywhere in the brain. Nor need the original injury have been necessarily severe, although the more extensive the lesion, the more likely the traumatic epilepsy. The convulsions may be jacksonian or generalized; there may be only periodic fainting or merely petit mal attacks. Sensory jacksonian fits may occur in parietal lobe lesions. Twilight states, periodic alteration of character, fits of bad temper, or affective hyperirritability and other equivalents may represent some of the psychic epileptic manifestations. I have seen narcolepsy follow fracture of the base of the skull.

"Delayed apoplexy (Spatapoplexie) occasionally occurs after trauma to the head. The interval between the receipt of the injury and the acute cerebral hemorrhage is given as from six days to as many weeks. In most of the cases where the connection was established, cerebral vascular disease, namely, [458] arteriosclerosis, was also found, so that the trauma can be considered only as precipitating or exciting and not an ultimate cause.

"Late Complications.—Aside from the occurrence of the late complications, such as traumatic encephalitis, abscess, meningitis, and epilepsy, one may also mention cysts of the brain, arachnitis, and serous meningitis. The latter may occur weeks after trauma to the head and give rise to signs of increased intracranial pressure, especially stupor, coma, and papilledema. This really is a subdural

hydroma (see subdural hematoma). At operation one may find a large amount of serous or blackish serosanguineous fluid, with marked flattening of the brain. Evacuation of the fluid results in recovery.

"Diagnosis.—The diagnosis of fracture of the skull is not difficult. Prolonged unconsciousness, the presence of cerebral nerve palsies, depression at the point of injury, bleeding from the mouth, nose, or ears, and escape of cerebrospinal fluid are fairly strong evidence of fracture. (Bleeding from the orifices caused by local injury is generally slight and temporary.) But one may exist in the absence of all those signs. Conversely, meningeal hemorrhage alone may give rise to many of the symptoms of fracture, while the presence of blood in the cerebrospinal fluid obtained on lumbar puncture may be evidence of either. None the less, bloody cerebrospinal fluid following a blow to the skull is very significant of fracture. An X-ray examination of the skull, therefore, is always indicated and should never be omitted, if for no other than medico-legal purposes. But a fissured fracture may be present and not be demonstrable on the X-ray plate; it is advisable, therefore, to take stereoscopical pictures. Sometimes only necropsy reveals the presence of a fracture. The electroencephalogram may show evidence of an organic lesion of the brain in the case of fracture; improvement in the electroencephalographic tracings runs parallel with recovery.

"Prognosis.—The prognosis varies with the severity and location of the injury to the brain. Immediate or early death occurs in a great many cases.

The death rate is high in lesions in the neighborhood of the medulla and frontal lobes. Fracture through the frontal sinus may result in late meningitis. [459] Generally, fractures of the base are more dangerous than those of the vault. Depressed and comminuted fractures offer a worse prognosis than simple fissured ones. Compound fractures carry the possibility of infection and subsequent meningitis or abscess. Loss of deep reflexes, drop in blood pressure, and fixed, dilated pupils are of ominous significance. In general, fractures of the skull are not only immediately serious, but may leave behind grave and permanent sequels. A great many patients never recover at all. Complete recovery and return to former occupation or previous intellectual vigor is not at all rare. However, recovery may take months or even years, and no definite prognosis can be ventured before all possibility of the occurrence of late complications has passed. Permanent deafness, facial paralysis, ocular palsy, and even optic atrophy may remain after fracture of the skull.

"Treatment.—The treatment varies with the type of fracture of the skull and extent of injury to the brain. The first problem is to ameliorate the effect of compression and prevent infection. In simple fracture expectant treatment is the best. The patient is kept in bed, and, if necessary, sedatives (bromides and chloral) are administered. Morphine is generally held to be contraindicated, because it increases intracranial pressure; but it is a question whether there is increased pressure in all cases of

fracture. In compound, comminuted, and depressed fractures the wound is exposed and thoroughly cleaned, blood clots, bone splinters, and foreign bodies are removed, and if brain tissue is destroyed it, too, is removed. During the war neurosurgeons practiced wide exposure of compound fractures and thorough removal of all tissue likely to harbor infection—debridement. Most surgeons are of the opinion, and I think justly, that conservative treatment is best, and they defer all operative inference until absolutely necessary. The war, however, taught that radical treatment is preferable in all cases of compound fractures, and, unless the patient is in profound shock, operation may be immediately performed. Obviously, turning down an osteoplastic flap, removing blood clots, and ligating bleeding vessels are indicated in localizable meningeal hemorrhages. All operations, of course, must wait until shock is over and the patient's condition warrants surgery. In the case of late serous meningitis, or effusions of serosanguineous fluid, repeated lumbar puncture and, if necessary, cerebral decompression is indicated. This is also advisable in case of cerebral edema, although other methods for reducing intracranial pressure also are available. In general, fractures of the base are not accessible to operations and had better be left alone. Operation is naturally indicated when either an epidural or cerebral abscess is present or suspected.

"Spinal puncture is frequently employed both for determining increase in intracranial pressure and reducing it, and for detecting the presence of blood in the case of subarachnoid hemorrhage. Repeated

spinal puncture is not necessary. Some surgeons are of the opinion, erroneously, I believe, that lumbar puncture is contraindicated in compound fracture because of the possibility of facilitating infection of the meninges by the reduction of intracranial pressure. The latter can be accomplished effectively by the administration of hypertonic solutions of glucose, salt, or magnesium sulphate (see Tumors of the Brain). Hypertonic solutions are said to be contraindicated in case of shock and hypotension and where there is evidence of severe compression or cerebral contusion. Recent experiments even point to a rise after temporary reduction; hence suggest that lumbar tap is better. Sucrose may be better, as it does not cause a secondary rise. In view of the fact that meningitis may develop in a certain number of cases, the suggestion has been made that in addition to antitetanus serum antistreptococcus and antipneumococcus serum also be given. The last are no longer necessary, as chemotherapy is more effective; wherefore sulfadiazine or one of the other sulfonamides should be administered.

"The subsequent surgical treatment of late complications, especially of epilepsy, depends on the nature of the lesion. The work of Foerster and Penfield and others indicates its value in selected cases and particularly in those with focal convulsions. Removal of bone defects and meningeal or brain scars may be followed by cure. Sedative therapy should be kept up for a long time after operation. Obviously encephalography should precede operation and, if possible, electrical cortical stimulation for purposes of localization should be done

during it. Plastic operations for defects in the skull are occasionally [461] of value, but sometimes aggravate the existing condition. The medicinal treatment is purely symptomatic, and the management of residual paralyses differs in no way from those occurring in the course of vascular accidents (see Apoplexy). The headache and the numerous other "nervous" manifestations are frequently intractable. Lumbar air insufflation has been suggested for the chronic posttraumatic headache. The convulsions are treated in the same way as those occurring in "idiopathic" epilepsy, namely, with phenobarbital, dilantin, bromides, etc. Attempt should be made at reeducation, and psychotherapy employed in the hope that the patient may be restored to a fair degree of usefulness."

The foregoing seven and one-third pages of typewritten matter have been copied from pages 534 to 540, inclusive, of "A Textbook on Clinical Neurology," etc., by Israel S. Wechsler, M.D., Fifth Edition, Revised, published by W. B. Saunders Company, Philadelphia and London, 1944, and are a true copy of the original text of said work considered in arriving at the decision embodied in the Judgment in the case of Frank Rowley v. Z. E. Eagleston, cause No. A-4239 of the District Court for the Territory of Alaska, Third Division. No other part of said book was considered. The foregoing is the material referred to in the latter part of Paragraph IV of the Findings of Fact in said cause signed and entered on Dec. 27, 1946.

/s/ ANTHONY J. DIMOND,
District Judge. [462]

[Title of District Court and Cause.]

ORDER

Upon oral motion of John S. Hellenthal, attorney for defendant-appellee, and upon stipulation of the attorneys for the respective parties hereto, and subject to the obtaining of permission from the United States Circuit Court of Appeals, Ninth Circuit, and for good cause shown, particularly because Exhibit No. 128 is not of a printable type.

It Is Hereby Ordered, Adjudged and Decreed:

That plaintiff-appellee's Exhibit No. 128 be forwarded with the transcript of record in this cause to the Clerk of the United States Circuit Court of Appeals, Ninth Circuit, San Francisco, California.

That plaintiff-appellee's photographic and X-ray exhibits, namely Exhibits Nos. 100 to 113, inclusive, and Exhibits Nos. 114 to 123, inclusive, be likewise forwarded to the Ninth Circuit Court of Appeals.

Dated at Anchorage, Alaska, this 29th day of October, 1947.

/s/ ANTHONY J. DIMOND,
District Judge.

I agree to the above proposed order this 29th day of October, 1947.

/s/ GEORGE B. GRIGSBY,
Attorney for
Defendant-Appellant.

[Endorsed]: Filed Oct. 29, 1947. [463]

CERTIFICATE OF CLERK TO TRANSCRIPT OF RECORD

United States of America,
Territory of Alaska,
Third Division—ss.

I, M. E. S. Brunelle, Clerk of the District Court for the Territory of Alaska, Third Division, do hereby certify that the foregoing and hereto annexed 464 pages, numbered from 1 to 464, inclusive, are a full, true and correct transcript of the records and files of the proceedings in the above entitled cause as the same appears on the records and files in my office; that this transcript is made in accordance with the Praecipe for Transcript of Record filed in my office on the 1st day of October, 1947; the Counter Praecipe filed in my office on the 29th day of October, 1947; and the Supplemental Praecipe for Transcript of Record filed in my office on the 21st day of November, 1947; that the foregoing transcript has been prepared, examined and certified to by me, and that the costs thereof, amounting to $77.15, has been paid to me by George B. Grigsby, counsel for the appellant herein.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court this 28th day of November, 1947.

[Seal] /s/ M. E. S. BRUNELLE,
Clerk of the District Court, Territory of Alaska,
Third Division. [464]

[Endorsed] No. 11807. United States Circuit Court of Appeals for the Ninth Circuit. Z. E. Eagleston, Appellant, vs. Frank Rowley, Appellee. Transcript of Record. Upon Appeal from the District Court for the Territory of Alaska, Third Division.

Filed December 3, 1947.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals for the Ninth Circuit

No. 11807

Z. E. EAGLESTON,

Appellant,

vs.

FRANK ROWLEY,

Appellee.

ORDER DISPENSING WITH THE REPRODUCTION OF EXHIBITS

This matter coming on upon the application and stipulation of the parties to the above entitled ac-

tion, by their respective attorneys, and good cause appearing, therefore:

It Is Ordered:

That, certain exhibits heretofore introduced in evidence on the trial of the above entitled action and now in the possession of the Clerk of this court, may be considered on the hearing of this appeal in their original form and without reproduction. The exhibits above referred to are Exhibit 128, being certain mortality tables, and Exhibits 100 to 113, inclusive, and Exhibits 114 to 123, inclusive, all the foregoing being photographs and X-ray photograps and pictures.

Dated December 31, 1947.

/s/ FRANCIS A. GARRECHT,
Senior United States
Circuit Judge.

[Title of Circuit Court of Appeals and Cause.]

ADOPTION OF ASSIGNMENTS OF ERROR AS POINTS ON APPEAL AND DESIGNATION OF PARTS OF RECORD TO BE PRINTED

To the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit:

Please be informed that the appellant in the above entitled action hereby adopts as points on which he intends to rely, the Assignments of Error appearing in the Transcript of Record.

Appellant designates for printing the entire Transcript of Record, except that part of the Bill of Exceptions consisting of the Transcript of Proceedings in the case entitled United States of America vs. Z. E. Eagleston, Defendant, No. 1986, which said Transcript of Proceedings is attached to and made part of said Bill of Exceptions.

/s/ GEORGE B. GRIGSBY,
Attorney for Appellant.

Service accepted this 9th day of December, 1947.

/s/ JOHN HELLENTHAL,
Attorney for Appellee.

[Title of Circuit Court of Appeals and Cause.]

ORDER WITH REFERENCE TO PRINTING TRANSCRIPT

Good cause appearing therefore,
It Is Hereby Ordered:

That, in printing the Transcript of Record in the above entitled action the printing of that part of the Bill of Exceptions consisting of the Transcript of Proceedings in the case entitled, "United States of America, Plaintiff, v. Z. E. Eagleston, Defendant, No. 1986, Criminal," be dispensed with and that in lieu thereof the printed Transcript of Record in Case No. 11545, entitled, "Z. E. Eagleston, Appellant, v. United States of America, Appellee," be used and considered by this court on the hearing of the appeal.

/s/ FRANCIS A. GARRECHT,
Senior United States
Circuit Judge.

Dated December 22, 1947.

[Endorsed]: Filed Dec. 23, 1947.

No. 11,807

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

Z. E. EAGLESTON,
Appellant,

vs.

FRANK ROWLEY,
Appellee.

BRIEF FOR APPELLANT.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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No. 11,807

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

Z. E. EAGLESTON,
Appellant,

vs.

FRANK ROWLEY,
Appellee.

BRIEF FOR APPELLANT.

JURISDICTIONAL STATEMENT.

Jurisdiction of the District Court is based upon Alaska Compiled Laws (1933), Title 3, and 48 U.S.C.A. Section 101 (Territories and Insular Possessions). This Court has jurisdiction under the provisions of 28 United States Code, Section 225, subdivision (a), First and Third and subdivision (d).

STATEMENT OF THE CASE.

THE PLEADINGS.

Appellee's amended complaint was filed December 6, 1946. (T. R. 6.)

It charged that on July 30, 1946, at Anchorage, Alaska, appellant unlawfully, without cause or prov-

ocation, violently, wrongfully, wantonly, maliciously, grossly, deliberately and outrageously made an assault upon appellee and beat, wounded and injured appellee by striking him on the head with an instrument, which appellee alleged on information and belief, was a long-handled garden rake, an instrument or weapon calculated to inflict great bodily injury; that appellee thereby suffered a depressed compound fracture of the skull, lacerations and destruction of the brain and the deposit therein of a metal foreign body and hair, bone and dirt; that appellee has and will suffer sickness, great bodily pain, discomfort and mental suffering from said wound; that appellee was seriously injured and disabled and was confined in the hospital for twenty-nine days; that at the time of filing the amended complaint, appellee was totally disabled and unable to perform any work; that in the treatment of his wounds appellee incurred hospital bills of $657.25, doctor bills of $2500, and damages of $50,000. In his amended complaint, appellee demanded judgment for $50,000 actual damages and $25,000 exemplary damages, or a total of $75,000. (T. R. 5, 6.)

Appellant's answer consists of a general denial of all of the allegations and appellee's complaint. (T. R. 4.)

THE CRIMINAL CASE.

Just prior to the trial of this case, appellant had been convicted in the District Court of the United States for the Territory of Alaska, Third Division,

of the crime of assault with a dangerous weapon upon appellee. That case arose out of the same altercation as in the instant case. The criminal case is now on appeal in this Court, being case No. 11,545.

THE TRIAL.

At the outset of the case, the parties, in open Court, stipulated to waive trial of this case by jury and that the Court should consider as being in evidence and before the Court all of the testimony and evidence given in the trial of the criminal case of *United States of America v. Z. E. Eagleston* (District Court No. 1986 Crim.; Circuit Court of Appeals No. 11,545), and that either of the parties might adduce additional evidence bearing upon the physical condition of appellee or relating to damages, as well as evidence upon any other feature of the case not adequately covered by the evidence in the criminal case. (T. R. 28.)

This Court ordered the printing of the Bill of Exceptions in the criminal case dispensed with and directed that the printed Transcript of the Record in the criminal case No. 11,545 be used by this Court on this appeal. (T. R. 188.) For the convenience of the Court, reference to the two transcripts in this brief will be marked as follows: criminal case "Crim. T. R.", civil case "T. R."

The Court, pursuant to an order of examination and with the consent of appellee's attorneys appointed the following physicians to make an exam-

ination of appellee: Drs. A. S. Walkowski, R. B. Coffin and George G. Davis. (T. R. 25, 26.)

THE EVIDENCE.

The incident out of which this case arose occurred in Anchorage, Alaska, about 8:45 a. m., on July 30, 1946. (Crim. T. R. 48.) Appellant, at that time, was the owner of a salvage yard where second-hand equipment was sold. (Crim. T. R. 189.) Appellee was an electrical worker and was engaged in installing an electrical system in Mt. View, Alaska. (Crim. T. R. 171.)

Shortly before July 30, 1946, appellant visited appellee at Mt. View, Alaska, and had a discussion with him about the purchase of a couple of war surplus generating plants. During this talk it developed that appellant owned an oil tank in which appellee expressed an interest (Crim. T. R. 171, 172) and there was some discussion about the price of the oil tank.

On July 30, 1946, at about 7:30 a. m. appellee, together with one Ken Hinchey, went to appellant's salvage yard in Anchorage, Alaska, for the purpose of purchasing and taking away the oil tank. Appellant was not there at the time. (Crim. T. R. 173.) George Miles, an employee of appellant, arrived at the yard shortly thereafter. (Crim. T. R. 173.) Appellee told Miles that he wished to buy the tank for $150. (Crim. T. R. 248.) Miles replied that he thought this was a low price and asked appellee whether he had

talked to appellant about it. Appellee said he had not. Miles then suggested that appellee see appellant about the price. (Crim. T. R. 248.) Appellee and Miles got into appellee's pick-up truck and began to hunt for appellant. (Crim. T. R. 248.) They first went to appellant's house. He was not there. They went to the Alta Club (Crim. T. R. 190) and then circled back to appellant's house and entered the back yard from the alley in the rear of the house. (Crim. T. R. 190.) Dave Foote, appellant's truck driver and handyman, was in the back yard at the time. (Crim. T. R. 190, 248.)

Appellee and Miles entered the house through the rear door, crossed a hallway and knocked at a door leading to appellant's bedroom. (Crim. T. R. 181, 248.) Appellant came to the bedroom door and said, "What the hell is your hurry, can't you wait a few minutes?" (Crim. T. R. 248, 415.) Miles told appellant that appellee was ready to take the oil tank from his junk yard, and that appellee insisted that the purchase price was $150. (Crim. T. R. 191, 415.) Appellant maintained that the price of the tank was $250. (Crim. T. R. 249, 416.) After some argument between them over the price, and after Miles left the house and went into the yard (Crim. T. R. 191, 249) appellant finally told appellee that the price was either $250 or nothing, and said: "Now don't call me a liar in my own house." (Crim. T. R. 416, 192, 96.) Appellee stepped outside the rear door and replied: "You are a liar". (Crim. T. R. 416, 90, 96.) Appel-

lant at that time was standing in the doorway of his house. (Crim. T. R. 90, 175.)

Miles testified that when he was five or six feet outside the door, he heard appellant tell appellee that the latter could not argue with him in his own house. This was immediately after Miles had left the house. (Crim. T. R. 249.) Miles also heard appellant tell appellee, "You can't call me a liar." (Crim. T. R. 192.) Furthermore, appellee said something to appellant that Miles could not hear, but Miles did hear appellant immediately thereafter say, "Take off your glasses." (Crim. T. R. 249.) Appellee took off his glasses and laid them on a stove just outside the door. (Crim. T. R. 416.)

Appellant took off his glasses and put them on a box. (Crim. T. R. 90.) Both men put up their hands and started to spar. (Crim. T. R. 91, 416, 127, 279.)

At this time Miles and Foote were in the yard. Behind appellee in the yard was a wood and trash pile (Crim. T. R. 78, Exhibits 1 to 4, Crim. T. R. 52-54) about twenty feet from the door of the house. (Crim. T. R. 226-7.) On the right of the yard, facing the alleyway, was a shed against which tools, implements and junk were strewn. (Exhibits 1 to 4, Crim. T. R. 52-54; 97.)

Evidence Conflicting as to Who Struck First Blow and Progress of Fight.

There is a sharp conflict as to who struck the first blow. Appellant testified that appellee struck first. (Crim. T. R. 416.) Appellee claimed that appellant

struck first (Crim. T. R. 175); in this he was corroborated by Foote (Crim. T. R. 91) and Miles (Crim. T. R. 192, 249). Louis Strutz, who had driven into the alley for the purpose of picking up a carton from among the rubbish in the alley (Crim. T. R. 254), testified that appellee was facing appellant with clenched fists. (Crim. T. R. 279.)

The evidence is also conflicting as to the details of the altercation that followed. Appellant testified:

> "As he took off his glasses and laid them down, we were sparring around (demonstrating)—we were hitting at one another and I was fast getting out of breath, and there were two or three blows he struck me that would have been counted. And as he hit me, I hit him on the left side, which caused him to turn around. I hit him and give him a shove and he got on the ground. He started to get up and I stepped back with my foot behind me—I grabbed ahold of the rake and lifted it up in this position." (Crim. T. R. 417.)

Appellant further testified that he grabbed the rake because he became winded grappling with appellee and wanted him to stop—that he (appellant) was through and wanted the fight to be through; that he wanted only to scare appellee (Crim. T. R. 417) and did not strike him with the rake or with any other implement or weapon. (Crim. T. R. 418.)

Corroborating appellant's contention that he was trying to withdraw and end the fight, is the testimony of Foote, who said that as appellee was falling the

first time appellant was backing away from him toward the door of his house. (Crim. T. R. 91, 93.)

All that appellee recalls is that appellant struck him once with his fist (Crim. T. R. 175) and he went backwards, rolled over on his left side and tried to pick himself up (Crim. T. R. 176) and that appellant subsequently picked up an instrument and raised it over his head. (Crim. T. R. 177.)

Appellee felt a pain in his head. (Crim. T. R. 177.) However, he was unable to state definitely whether he felt this sensation of pain before or after he fell to the ground. (Crim. T. R. 178.)

Miles, who, at the time of the trial had been discharged by appellant (Crim. T. R. 189), testified that appellant struck appellee with a rake after appellee was on the ground. (Crim. T. R. 193, 249.)

Foote testified appellant hit appellee with his right hand and that appellee fell on his right side into the woodpile (Crim. T. R. 91, 96), rose two-thirds of the way up and again fell, this time on his left side, head first against the wall (Crim. T. R. 92, 93, 97, 98); that there were shovels, rakes and a pick up on a shed toward which appellee fell and that they were falling off the shed as appellee fell toward it. (Crim. T. R. 97.)

While Foote testified he took a rake from appellant's hand while appellee was on the ground (Crim. T. R. 97), he repeatedly testified that he never saw appellant strike appellee with it. (Crim. T. R. 97, 121.) Moreover, Foote testified that after appellee

fell his head was resting on a blood-stained shovel (Crim. T. R. 112, 122) in a wood pile (Crim. T. R. 91) which contained a number of other tools. (Crim. T. R. 110.)

Strutz testified that although he saw appellant wield a long-handled instrument, he did not see him strike anybody with it. (Crim. T. R. 255, 259, 264, 265, 282.)

Appellant testified that he picked up a rake while appellee was on the ground. (Crim. T. R. 417-8.)

There is an abundance of evidence substantiating appellant's position that appellee's injuries resulted from a fall into the woodpile while he was sparring with appellant. (Crim. T. R. 91, 96, 101, 115, 121, 175, 417.)

Testimony Relating to Damages.

Testimony of Physicians.

Dr. Romig (called on behalf of appellee).

He testified he attended appellee on July 30, 1946 (the date of the altercation) and examined him the day before the opening of the trial in the presence of three other doctors. When he first saw him on July 30, appellee was suffering from a compound comminuted, depressed fracture of the skull—in other words, the wound was open, there were many fragments, some of which were shoved down into the brain substance. In addition to treating appellee for the fracture, the doctor treated him for laceration of the brain, the dura, and hemorrhage and shock. (T. R. 31.)

Appellee, after having been treated with various antitoxins, was brought out of a small degree of shock and taken to the operating room. There the doctor made an incision in appellee's head, reaching from the front of his scalp to the mid-back portion of the scalp. This incision was extended laterally sufficient to allow an operation on the fracture hereinbefore described. (At this point the doctor used a photograph (Plaintiff's Exhibit 8 in the criminal case) to illustrate the extent of the fracture. (T. R. 32.)

Having exposed the fracture and the destroyed brain tissue, the doctor removed a considerable number of small fragments of bone from appellee's brain. Most of these fragments had hair clinging to them. About two-thirds of an ounce by volume of destroyed brain tissue was removed. Bleeding was controlled by tying off two large veins. The wound was irrigated, the dura sutured over the defect, and the usable bone fragments were cleaned and replaced on top of the dura. A good number of the bone fragments had to be thrown away. The deepest fragment removed from appellee's brain was one and one-quarter inch below the outside of the skull. These fragments were located in the frontal parietal area. After the dura had been stitched, and covered with bone, the scalp was sutured and the patient returned to his room. X-rays, taken before the operation, were used by the doctor during the operation. (T. R. 32, 33.)

The X-rays depicted the bone fragments in the forward part of the skull and a thin fracture line running from just above appellee's nose up to the comminuted area and then backwards to the vortex of the skull. (T. R. 34.) This fracture connected with the frontal sinus and one of the air spaces connected with appellee's nose. (T. R. 35.)

X-ray, Exhibit No. 13, showed a bone fragment in the brain substance. This is presumably the one removed by the doctor. (T. R. 35.)

(The doctor then described nine photographs taken during the progress of the operation (T. R. 36, 37, 38) by a police officer. (T. R. 30).)

X-rays taken some two weeks after the operation showed an area of decreased density between the brain and the skull indicating that air had infiltrated from the sinus through the fracture. (T. R. 37.)

After replacing bone fragments in the wound, there was a space between the size of a quarter and a fifty-cent piece in which no bone remained. A piece of bone was placed in the middle of this area in the hope that it would cover the area. (T. R. 38.)

Although appellee complained of numbness in his left arm, examination showed no positive findings as far as the arm was concerned. (T. R. 38.) His course in the hospital was very satisfactory—fever was never high and subsided in a few days. (T. R. 39.)

X-rays were taken at regular intervals after the injury. In analyzing Exhibit 105 (an X-ray), the doctor stated that the decreased density thereon

indicated the presence of air, but, in response to a question from the Court, admitted that this appearance could represent an absence of bone. (T. R. 39.)

(Stereopticon film X-rays were described by the doctor in order to show the fracture line and the position of the replaced bone fragments hereinbefore described. (T. R. 39, 40).)

On August 21st, appellee's progress at the hospital was considered as highly satisfactory. This judgment was corroborated by one or two other doctors who had seen him, and accordingly appellee was sent home. (T. R. 40.) Appellee's mental capacities had been dulled and that this symptom had become more apparent in the few weeks immediately preceding the trial. At the time of the trial appellee *complained* of dizziness, headache, ringing in his ears, inability to function mathematically at times, and increased fatigability. (T. R. 41.)

His findings were based upon the symptoms given him by the patient and upon the history of the case, which began July 30th and ran until the date of the trial. (T. R. 44.) His prognosis was based upon his diagnosis and his *recent* study of *a medical textbook*—"Wechsler's Textbook of Neurology", published by W. B. Saunders & Co., and upon "Attorneys Textbook of Medicine" by Gray, published by Matthew Bender and Company. (T. R. 44, 45.)

The doctor further testified:

> "Wechsler is an outstanding authority, and the other as I understand it is a medical testbook for

attorneys. I have not been acquainted with it until a late date, but Wechsler I have been acquainted with for many years. I think this attorney's textbook of medicine came from the Judge's chambers. I read on the inner part of the cover, 'Property of the United States for use of the District Judge.' Based upon my diagnosis and study of the text you have mentioned, and my experience as a surgeon and physician, my prognosis in this particular case of Mr. Rowley is unfavorable." (T. R. 45.)

The doctor then testified that appellee might have no end to his headaches, dizziness, ringing in his ears, nervousness, fatigability, nightmares and insomnia; that these symptoms might become worse and that epilepsy could ensue.

"Wechsler's Textbook places that at five and ten per cent up to thirty in severe injuries." (T. R. 45.)

He said that the outcome of epilepsy depends largely upon the amount of brain tissue destroyed and the proximity of the damaged brain tissue to the motor centers.

"By Wechsler placing it at 10 to 30 per cent, they estimate that a man with a severe head injury has about a 10% chance of becoming a confirmed epileptic, and in some types of injury, but not specifically the one involved, it is even known to be higher. Not only could he have that as a complication, but he could have, even at a late date, meningitis—inasmuch as it communicates with the sinus, he could even have a brain abscess." (T. R. 45, 46.)

He testified that appellee's condition, at the time of the trial was no better than when he left the hospital; that it was possible that appellee could go through the remainder of his life without any epilepsy; that epilepsy and the continuance of the discomforts of headaches, dizziness, ringing in the ears, nervousness, fatigability and sleeplessness might not happen, but appellee will always have some measure of his present discomfort. (T. R. 46.)

The doctor then proceeded to read into the record the following from page 538 of Wechsler's Textbook:

> " 'Prognosis.—The prognosis varies with the severity and location of the injury to the brain. Immediate or early death occurs in a great many cases. The death rate is high in lesions in the neighborhood of the medulla and frontal lobes. Fracture through the frontal sinus may result in late menginitis. Generally, fractures of the base are more dangerous than those of the vault. Depressed and comminuted fractures offer a worse prognosis than simple fissured ones. Compound fractures carry the possibility of infection and subsequent meningitis or abscess. Loss of deep reflexes, drop in blood pressure, and fixed, dilated pupils are of ominous significance. In general, fractures of the skull are not only immediately serious, but may leave behind grave and permanent sequels. A great many patients never recover at all. Complete recovery and return to former occupations or previous intellectual vigor is not at all rare. However, recovery may take months or even years, and no definite prognosis can be ventured before all possibility

of the occurrence of late complications has passed. Permanent deafness, facial paralysis, ocular palsy, and even optic atrophy may remain after fracture of the skull.' " (T. R. 46, 47.)

He went on to explain that injuries to the frontal area of the brain are generally worse than in other areas. Referring to the fracture in the frontal sinus, he again quoted from Wechsler as follows:

" '* * * fracture through the frontal sinus may result in late meningitis.' " (T. R. 47.)

The doctor then further summarized Wechsler's Textbook (pp. 254 and 255) in the following language:

"This is pages 254 and 255, and I think, with the permission of the Judge, I would like to just brief this because it is a little boring to read the whole thing. From these pages I glean the following facts: That after an injury of this type headache follows in 67 per cent of the cases. This is intractable in some cases. Also dizziness, ringing of the ears, optic nerve injury, deafness, nervousness, fatigability, insomnia—the percentages are as follows: Dizziness, 60 per cent; ringing of the ears, 9 per cent; optic nerve atrophy, 19 per cent; deafness, 11 per cent; nervousness, 20 per cent; fatigability, 13 per cent; insomnia, 7 per cent. In other words, according to these percentage figures, considering Mr. Rowley's injury, he has a great likelihood of never ever being free of any one of these miserable symptoms. He has at the present time headache, dizziness, ringing of the ears, nervousness, fatigability, and insomnia." (T. R. 48.)

He stated that appellee told him that he had all of the symptoms *described above in Wechsler* and that he had never been free from headache for more than two days, "according to his story" (T. R. 48):

> "There is no other authority I would care to read to the Court in connection with my prognosis." (T. R. 49.)

The doctor stated that appellee could not return to regular work at the time of the trial and he could not say when he would be able to return to his regular job—that there was a chance of his never being able to hold down a regular job; that however he had advised appellee to work; that it was part of his treatment and was necessary to his recovery. At the time appellee left the hospital he advised him to move about moderately, increase his amount of exercise and begin gradually to work—in the lines of his electrical work (T. R. 49), the amount or quantity of work he was to do being more or less up to appellee. (T. R. 49.) Appellee was to work until he became tired and then cease. (T. R. 49.)

> "I do not know that he will ever be able to hold a job. However, I would not be surprised if he could. The outlook as far as that is concerned is rather indefinite." (T. R. 49.)

The doctor then stated that he felt that appellee should seek the services of a specialist at a recognized medical center, preferably Mayo's, and that it might be possible that the specialist would decide to reopen the skull to remove scar tissue and bone frag-

ments. This would entail a cost of as much as $1400. He expected appellee to be under a physician's care for a considerable period of time. (T. R. 50.) His fee for services to appellee was $750, although he admitted he had originally asked for $2500. (The Court will note that in appellee's amended complaint, the fee for physician's services is listed at $2500. (T. R. 6.))

He had performed three operations of the type performed on appellee, in one of which the patient died. He had not performed an operation of this type for eight or nine years. (T. R. 51.)

That appellee had previously lost an eye and had a scar on his scalp; that these injuries were of no significance as far as this case was concerned; although there could have been a previous fracture on account of the scar on the scalp. (T. R. 54.)

Dr. Walkowski (one of the three physicians appointed by the Court to examine appellee, and called as a witness by appellee).

He testified that appellee had sustained a skull fracture; a tear of the fibrous covering of the brain and loss of brain tissue in the right frontal lobe. He did not see these things. His diagnosis was based on the statements made by appellee as to his feelings and sensations and his examination and interpretation of the X-rays. (T. R. 58.) Because of this limited diagnosis his prognosis was incomplete. A proper prognosis should be based upon a longer observation of the patient. (T. R. 59.)

He found no symptoms of epilepsy (T. R. 60), and was in no position to make a positive statement as to late meningitis. (T. R. 61.) Headaches and dizziness could very well continue, but he would not estimate for what length of time. (T. R. 61, 62.) He was unable to state any possibility of insanity. (T. R. 62.) While appellee had suffered a severe brain injury, the loss of two-thirds of an ounce of brain tissue from the frontal lobe of the brain could, or could not, result in personability changes. (T. R. 62.)

His diagnosis of headaches, dizziness and ringing in the ears was based solely on the word of appellee. (T. R. 63.)

The dark area on the X-rays (which Dr. Romig attributed to the presence of air) could be merely loss of substance and not air. (T. R. 64.) There was no present indication of any cerebral spinal fluid being discharged through the nose so as to indicate that the skull fracture had extended into the sinus. In this connection the examining physicians had appellee blow his nose to examine the resulting secretion. (T. R. 64, 65.)

The physicians appointed by the Court gave a rather thorough manual examination of appellee; that his equilibrium was normal; his contraction was equal on both sides, and that he was a normally strong man with respect to his arms, shoulders and legs. (T. R. 65, 66.)

Appellee would be benefited by working up to the limit of his capacity and that he was not in a posi-

tion to say just what amount of work appellee might be able to do. (T. R. 66.) Appellee was given coordination tests by the examining doctors, known as aviation tests, and his response thereto was within normal limits. (T. R. 66, 67.) Presently, appellee is in pretty good physical condition. (T. R. 67.)

Appellee should endeavor to try working at his occupation before considering any trip to a clinic such as Mayo Brothers. (T. R. 67.)

Dr. Coffin (one of the three physicians appointed by the Court to examine appellee, and called as a witness by appellee).

He testified that he had seen appellee on the morning of the injury. He had a laceration of the scalp with brain tissue protruding through the wound. He helped shave appellee's hair to prepare the wound for operation. His description of the laceration was very approximate as he did not follow the case. The wound was approximately three inches long on the right frontal area of the scalp. (T. R. 71, 72.)

His next contact with appellee was at his examination at the Court's direction. Appellee showed some clumsiness in physical and mental activities. He had no paralysis or loss of reflexes. He complained of headache, dizziness, ringing of the ears and sense of unsteadiness. The prognosis as to life is good, but as to full recovery of complete mental, emotional and physical efficiency, rather poor. He would counsel appellee to follow further specialized medical treatment and not to assume any regular work at the

present time. He should attempt, however, to work at the present time, basing his ability so to do upon whether it caused severe headaches or exaggeration of his symptoms of dizziness and unsteadiness. His ability to work would have to be left to HIS DISCRETION. (T. R. 72, 73.)

The doctor had no opinion as to a specified time when appellee's symptoms might stop. (T. R. 73.) It was not likely that scar tissue resulting from appellee's wound would have to be removed—that it was not common practice to remove these scarred areas. Fragments of skull beneath the level of the skull might have to be removed if they produced pressure symptoms. (T. R. 74.)

Appellee responded very well to the equilibrium tests given by the doctors; his strength was good as were his reflexes. (T. R. 75, 76.)

Dr. Davis (one of the three physicians appointed by the Court to examine appellee, and called as a witness by appellant).

He testified that he first saw appellee the day he was injured; appellee had a laceration about three inches long in the right frontal region and brain material was escaping. He looked at it and could see that it was a depressed fracture. He did not see any fragments of skull. (T. R. 79.) When the doctors examined appellee the day before the trial it was agreed that they would first take the subjective symptoms—those which the patient felt or complained of as distinguished from what might be observed. Ap-

pellee stated he had a headache and pointed to the area of the healed laceration at about the border of the hair line. He stated that the attacks were not present all the time; that he had none at the time of the examination; that he had had one the night before and that they came and went at times. He complained of ringing of the ears at times. He complained of dizziness, but stated that he did not use a cane. (T. R. 80.) He said he had nightmares.

The fracture being in the frontal region it was deemed advisable to find out whether the functions involved in the frontal region were disturbed. These functions are intelligence, consciousness, reason and conscience. Appellee was asked and answered some arithmetic questions and other questions of general current knowledge. His answers were made readily, coherently, with little hesitation, and were generally correct. (T. R. 82.)

The doctor examined the scar resulting from the injury under discussion, and when he palpated the scar appellee complained of pain. (T. R. 82, 83.)

Appellee stated that his appetite was good and his weight had increased.

Appellee was given an equilibrium test, such as that regularly applied to aviators, which showed that he had not lost his sense of equilibrium, but that he still had a sensation of dizziness. His eyes and ears seemed normal (T. R. 83) and his nose and mucus therein gave no evidence of the existence of cerebral spinal fluid. He evidenced no loss of strength, nor loss of

reflexes. When tested for balance, his coordination was good. (R. T. 84.)

At the examination the three doctors questioned whether or not they should discuss things together and send in a combined report, but decided against this and argued that each doctor would give his individual opinion in Court. (T. R. 85.)

The X-rays showed a definite change in the patient before and after the operation. After the operation there was an excellent elevation of the depressed skull fracture. (T. R. 85.) There was a bone defect caused by lack of the fragments which Dr. Romig could not use. Between the vault of the skull and the brain there was an area of lesser density which could have resulted from the presence of air or from lack of brain tissue. (T. R. 86.) Destroyed brain tissue never regenerates. (T. R. 87.)

Appellee has not had cerebral spinal fluid in his frontal sinus, nor air in his skull. (T. R. 88.)

The doctor's diagnosis is that appellee is suffering sensory symptoms as a result of the skull fracture without loss of function of the body. (T. R. 89.) The loss of brain tissue is not very important. The entire front lobe of the brain can be taken out without loss of normal symptoms. (T. R. 89.) This is being done very day. (T. R. 90.)

The entire episode of the injury and operation and shock might have an influence upon appellee. (T. R. 90.) Loss of the brain tissue has its quota of influence and in part accounts for the presence of sub-

jective symptoms. (T. R. 91.) It is not necessary to have the scar tissue removed as the brain is not near the vault (T. R. 91, 92), nor will it be necessary in the future to remove fragments of bone from appellee's skull. The brain is not being pressed on by the bone fragments. (T. R. 92.)

Appellee is not a malingerer. He should be returned to work. As much regular work as he could stand would be an excellent thing for him. (T. R. 93.) Upon his first return to work his hours of work would be comparatively few. At the end of a month he would be working much more. (T. R. 94.)

He might have subjective symptoms for a year, but physically he could do the work. (T. R. 94.) He might be hampered by headaches, ringing of the ears and dizziness, but physically he would be able to work. (T. R. 95, 96.) The doctor would advise him to go back to work at whatever work he does. (T. R. 96.)

Appellee will not have a generalized epilepsy in the future. He might have a *petit mal* but he will not have generalized epilepsy because the injury is not over the motor areas. He will have no contractures. There is no possibility of his ever acquiring late meningitis. (T. R. 100.)

There is no infection going from the frontal sinus, from the meninges, and there will not be any subsequent from now. (T. R. 101.) There is no possibility of appellee dying from the wound he received. (T. R. 102.) Headaches and dizziness might continue for some time. (T. R. 103.) Appellee is already blind in

the right eye, but there is no possibility of his becoming blind in the left eye as a result of this injury. There is no possibility of insanity. (T. R. 104.)

There will be no loss of function. Appellee is in good condition. The litigation has had a very definite reaction upon appellee. One of the healthiest things for appellee would be the termination of the case and for him to get back to work. (T. R. 106.)

Testimony of Insurance Agent.

Hugh Daugherty (called on behalf of appellee) testified that he was an agent of the New York Life Insurance Company and had been in that business for ten years and that he had taken courses in insurance in his company and by correspondence. He was familiar with tables of expectancy and annuity and had a great deal of experience in gathering and interpreting actuarian data. The life expectancy of a man aged 41 is 27½ years. He got that information from the American Experience Table of Mortality used by all major insurance companies. That table is contained in the New York Life Insurance Company's rate book—a book used constantly in insurance work. (T. R. 132.)

Over the objection of appellant, the witness was allowed to testify that the cost of an annuity which would yield $400 a month to an individual 41 years old for the rest of his life, based upon his life expectancy, would be $122,892; $300 a month for such a man would cost $92,169, $200 a month $61,446, and $100 a month $30,723. (T. R. 132 to 135.)

The following then transpired:

"Mr. Hellenthal. Now, Mr. Daugherty, could a man who had suffered a compound, compressed, depressed fracture of the skull obtain life insurance?

Mr. Curry. We object, if the Court please. The witness hasn't qualified yet as any expert to pass upon the subject; and it is immaterial.

The Court. Objection overruled.

Witness. I would answer that 'No', that there would be no possibility of that man obtaining insurance." (T. R. 136.)

Testimony of Other Witnesses.

Frank Rowley, appellee, testified as follows: that he was forty-one years old; finished the 8th grade in school; went to a night trade school that taught electricity. (T. R. 107.) He injured his right eye when he was 13 years old which injury resulted in its removal when he was 18. He worked in orchards and did general electrical work in various states and Alaska. His earning range was from 25¢ an hour in 1922, to $350 per month in 1944. (T. R. 108-112.) He did some work for the War Department in 1945 and made as high as $450 per month for some months.

In 1945 his gross earnings, before deductions, were $5152.90.

In 1946 he made approximately $400 per month. (T. R. 113.)

At the time of the injury he was installing an electric distributing system at Mountain View, Alaska, in which he had invested $5000. Everything that he

had was invested in that business. (T. R. 113, 114.) He was married in 1933 and has five children, ranging from three to twelve years of age.

His hospital bill was $744.25. (T. R. 115.) He was in the hospital for twenty-nine days and had done some work since getting out of the hospital, consisting of work around the house. He did nothing in connection with his distributing business. He hired a man to put a generator back together at an expense of $70.00. He cannot do any lifting. He cannot climb telephone poles. He has headaches at the point of the injury which increase as he gets overly tired. Sometimes the headaches come on frequently. The longest period he had gone without a headache is one day. Other things bother him, such as ringing of the ears and dizzy spells. It hurts him to concentrate. He doesn't sleep well at night and has bad dreams. There are times that he feels good. He doesn't feel that he can go back to regular work because he cannot do any lifting. He could not stand eight hours of bench work. (T. R. 116, 117.)

In 1946 his income tax statement showed an income of $3395.05 from December 10, 1945 to September 15, 1946. He has earned nothing since the injury. (T. R. 118.) His earnings for 1945 and 1946 include overtime and he had considerable overtime. (T. R. 119.)

He suffered much pain at the time of the injury and since. He could remember very little the first three or four days in the hospital; then he seemed to gradually get better. His head hurt until he got out of the hospital and then it hurt most when he tried to

do any thinking. He feels better when he is fully relaxed. (T. R. 120, 121.)

The following then transpired:

"Q. Now Mr. Rowley, have you given much thought to your future?

A. Well, it worries me to——

Mr. Grigsby. If the Court please, we object to this line of examination as immaterial to the issues set up in the complaint. There is no claim for anything except loss of capacity to labor and pain and suffering, and the complaint contains no claim for damages for mental injury whatever except, of course, what would be inferred as affecting capacity to work, but his thoughts for the future I think are immaterial.

Mr. Hellenthal. Your Honor, I am introducing this under the complaint—to prove mental suffering.

The Court. Objection overruled. You may answer.

Witness (continuing). Well, the future does worry me to a certain extent because I have a large family and—but I try to keep from worrying as much as I can because it don't do me any good, because worry is the worst thing I can do for my health, I figure." (T. R. 121.)

Albert Henry Dyer (witness on behalf of appellee) testified that he had known appellee for four or five years; that his habits for industry, dependability and sobriety were good (T. R. 120) and that appellee has shown a lack of alertness since the injury. (T. R. 138.)

George Peterson testified that he had known appellee since May of 1945; that he was appellee's supe-

rior at Fort Richardson. He described the nature of appellee's electrical work and stated that he was a steady and sober worker. (T. R. 124, 125, 126.)

R. S. Richards testified that he had known appellee for four years and that he was a steady and sober man. (T. R. 129.)

Robert Risley testified that he had known appellee since 1941; he used to live next door to him and he belonged to the same lodge. Appellee's habits as to industry and sobriety were good. (T. R. 130, 131.) In observing appellee since the accident he is obliged to repeat questions or statements made to appellee and that he does not recall doing this before the injury. (T. R. 137.)

Mrs. Frank Rowley (the wife of appellee) testified that at the time of the accident, at the hospital, she observed mucus and blood coming from appellee's nose and throat. This continued for a period of three or four days. Since the accident appellee's mental state has been different; he responds more slowly when speaking; he takes longer to think and he seems to be hard of hearing. She did not notice these things before the injury. (T. R. 139.)

Norman C. Brown (witness on behalf of appellee) testified that he was a newspaper publisher in Anchorage; that appellant has the reputation of having some money, but that the witness does not know of his own knowledge as to his wealth. (T. R. 122, 123.)

Rose Walsh (Recorder for the Anchorage Precinct, called on behalf of appellee) testified that a real and

chattel mortgage dated November 4, 1946, had been recorded in her office, running from Z. E. Eagleston to L. McGee, covering certain real and personal property. This mortgage secured a note in the sum of $48,000 with interest at 8%. (T. R. 127, 128, 129.)

R. S. Richards testified that appellant had a reputation of a man of considerable wealth and that he was reputed to be worth a quarter of a million dollars. (T. R. 129.)

A. H. Dyer testified that he knows appellant's reputation as to wealth and that he was reputed to be worth approximately $250,000. (T. R. 130.)

L. McGee (called on behalf of appellant) testified that he loaned appellant the $48,000 and took from him the mortgage hereinabove mentioned. He had seen the real property covered by the mortgage, but he was not too familiar with the chattels listed. He did not make the loan as a business loan, nor fix the amount that he was willing to loan entirely on the value of the property. He took into consideration the fact that he had loaned appellant money before without security. The most he had previously loaned appellant, without security, was in the neighborhood of $17,000. He would not loan a substantial sum of money on the junk outside the real estate. All of the property secured by the mortgage has a market value of around $35,000. (T. R. 140 to 142.)

Z. E. Eagleston, appellant, testified that he came to Alaska in August of 1939, and that upon his arrival

he only had ten dollars. He worked for a newspaper; at the Army Base as a laborer and clerk (T. R. 142, 143) and then began collecting junk. He continued in the junk business up until the time of the trial. (T. R. 143-147.) In February, 1944, he became connected with the Alta Club as trustee and continued to take care of the Alta Club and the junk business. (T. R. 147, 160.) The mortgage given to McGee covers everything appellant owns with the exception of personal property, such as clothing. (T. R. 147.) The market value of his real and personal property is $60,000. (T. R. 148.)

At the present time he does not believe he is worth over $18,000 besides cash. (T. R. 155.) At the time he borrowed from McGee he endeavored to borrow money at the Bank of Alaska and the First National Bank without success. (T. R. 155.)

FINDINGS OF FACT, JUDGMENT AND APPEAL.

The District Court entered findings of fact (T. R. 164, also 8-10), conclusions of law and judgment awarding compensatory damages to appellee in the sum of $37,000. (T. R. 11, 12.) Appellant filed a motion for new trial which was denied on December 27, 1946 (T. R. 7), to which ruling appellant excepted and the exception was allowed. (T. R. 12, 13.) Appellant thereupon filed his petition for allowance on appeal on March 14, 1947 (T. R. 14) and filed his assignment of errors. (T. R. 15.)

SPECIFICATION OF ERRORS.

The trial Court erred in the following particulars:

1. That prejudicial error was committed in allowing Dr. Romig, a witness for appellee, to read into evidence excerpts from a medical textbook, Wechsler's Textbook of Neurology. (T. R. 45-48.)

2. That prejudicial error was committed in admitting into evidence pages 534 to 540, inclusive, subentitled "Fracture of the Skull" of "A Textbook of Clinical Neurology, with an Introduction on the History of Neurology," by Israel S. Wechsler, M. D., Fifth Edition, Revised, 1944, W. B. Saunders Company. (T. R. 172 to 182.)

3. The trial Court erred in its finding "that in the fixing of said amount of Thirty-seven Thousand Dollars, pages 534 to 540, inclusive, sub-entitled 'Fracture of the Skull,' of 'A Textbook of Clinical Neurology, with an Introduction on the History of Neurology,' by Israel A. Wechsler, M. D., Fifth Edition, Revised, 1944, W. B. Saunders Company, were considered." (T. R. 9, 10.)

4. The trial Court's conclusion of law is erroneous in that it is based upon incompetent evidence, erroneously admitted, and an erroneous finding of the trial Court based upon said incompetent evidence. (T. R. 10.)

5. The trial Court erred in denying appellant's motion for a new trial. (T. R. 7.)

6. That prejudicial error was committed in admitting into evidence, over the objection of appellant, the

opinion of a life insurance agent as to appellee's ability to obtain life insurance. (T. R. 136.)

7. The trial Court erred in its finding "That plaintiff has been injured in the premises in the amount of Thirty-seven Thousand Dollars, all, in actual or compensatory damages;" for the reason that the sum mentioned in said finding is excessive and not justified by the evidence introduced in the trial of said cause, to which judgment appellant excepted. (T. R. 9, 12, 17.)

8. That the trial Court's conclusion of law and judgment are erroneous in finding that appellee is entitled to judgment in the sum of thirty-seven thousand dollars for the reason that said sum is excessive and not justified by the evidence introduced in the trial of said cause, to which judgment appellant excepted. (T. R. 10, 11, 13, 17.)

ARGUMENT.

FIRST POINT RAISED.

IT WAS PREJUDICIAL ERROR FOR THE TRIAL COURT TO ALLOW IN EVIDENCE EXCERPTS FROM A MEDICAL TEXT-BOOK AS PART OF APPELLEE'S CASE IN CHIEF, AND TO RELY THEREON IN MAKING ITS FINDINGS, CONCLUSIONS AND JUDGMENT.

1. **That prejudicial error was committed in allowing Dr. Romig, a witness for appellee, to read into evidence excerpts from a medical textbook, Wechsler's Textbook of Neurology.**

2. **That prejudicial error was committed in admitting into evidence pages 534 to 540, inclusive, sub-entitled "Fracture of the Skull" of "A Textbook of Clinical Neurology, with an Introduction on the History of Neurology," by Israel S. Wechsler, M.D. Fifth Edition, Revised, 1944, W. B. Saunders Company.**

3. **The trial Court erred in its finding "that in the fixing of said amount of thirty-seven thousand dollars, pages 534 to 540, inclusive, sub-entitled 'Fracture of the Skull,' of 'A Textbook of Clinical Neurology, with an Introduction on the History of Neurology,' by Israel S. Wechsler, M.D., Fifth Edition, Revised, 1944, W. B. Saunders Company, were considered."**

4. **The trial Court's conclusion of law is erroneous in that it is based upon incompetent evidence, erroneously admitted, and an erroneous finding of the trial Court based upon said incompetent evidence.**

5. **The trial Court erred in denying appellant's motion for a new trial.**

During the presentation of appellee's case in chief, Dr. Howard G. Romig, on direct examination, stated the following (T. R. 44, 45, 46):

> "The prognosis is to be called the outlook in Mr. Rowley's case, what he can expect and how comfortable he will be, or how uncomfortable he will be. *My prognosis,* in addition to being based upon my diagnosis, *is in some measure based*

upon my recent study of Wechsler's Textbook of Neurology. I do not know who publishes that textbook. *The book you hand me is a 1944 Edition of Wechsler's Textbook of Neurology,* published by W. B. Saunders & Co. *My prognosis is based also on Attorneys Textbook of Medicine,* by Gray—1940 Edition, published by Matthew Bender and Company. Wechsler is an outstanding authority, and the other as I understand it is a medical testbook for attorneys. I have not been acquainted with it until a late date, but Wechsler I have been acquainted with for many years. I think this attorney's textbook of medicine came from the Judge's chambers. I read on the inner part of the cover, 'Property of the United States for use of the District Judge.' Based upon my diagnosis *and study of the text you have mentioned,* and my experience as a surgeon and physician, my prognosis in this particular case of Mr. Rowley is unfavorable. I mean that Mr. Rowley may have no end to his headaches, to his dizziness, to the ringing in his ears, to his nervousness, to his fatigability, and his nightmares and insomnia. He may have no end to those. They may, in fact, become worse. Not only could he have those complications, but epilepsy, for example, could ensue. *Wechsler's Textbook places that at five and ten per cent up to thirty in severe injuries.* By that I mean that the outcome of epilepsy depends in large measure upon the amount of brain tissue destroyed and the proximity of the damaged brain tissue to the motor centers. *By Wechsler placing it at 10 to 30 per cent, they estimate* that a man with a severe head injury has about a 10% chance of becoming a confirmed epileptic, and in some types

of injury, but not specifically the one involved, it is even known to be higher. Not only could he have that as a complication, but he could have, even at a late date, meningitis—inasmuch as it communicates with the sinus, he could even have a brain abscess. Mr. Rowley's condition is no better, in fact, since he left the hospital. It is also possible that Mr. Rowley could go through the remainder of his life without any epilepsy. When I speak of prognosis of epilepsy, and these various disorders I have described, I do not mean it is going to happen, but in my opinion Mr. Rowley will never be free of some measure of his present discomfort. Those discomforts that he suffers now are headaches, dissiness, ringing in the ears, nervousness, fatigability, sleeplessness, and he has the one positive finding of diminished cerebration. Mr. Rowley is not mentally as capable now as I have known him before. I would say I have known him eight years. (Italics ours.)

(*Witness reads from Wechsler, page 538 of the 1944 edition,* as follows) (T. R. 46, 47):

'*Prognosis.—The prognosis varies with the severity and location of the injury to the brain. Immediate or early death occurs in a great many cases. The death rate is high in lesions in the neighborhood of the medulla and frontal lobes. Fracture through the frontal sinus may result in late meningitis. Generally, fractures of the base are more dangerous than those of the vault. Depressed and comminuted fractures offer a worse prognosis than simple fissured ones. Compound fractures carry the possibility of infection and subsequent meningitis or abscess. Loss of deep reflexes, drop in blood pressure, and fixed dilated*

pupils are of ominous significance. In general, fractures of the skull are not only immediately serious, but may leave behind grave and permanent sequels. A great many patients never recover at all. Complete recovery and return to former occupations or previous intellectual vigor is not at all rare. However, recovery may take months or even years, and no definite prognosis can be ventured before all possibility of the occurrence of late complications has passed. Permanent deafness, facial paralysis, ocular palsy, and even optic atrophy may remain after fracture of the skull.'

The lesion in this injury occurred in the frontal area, rather close in the motor cortex. That is back close to the mid portion of the brain. It roughly covers the frontal lobe. *When they said the death rate is high in lesions in the neighborhood of the medulla and frontal lobes, they mean the same frontal lobes I am now speaking of. While the medulla and frontal lobes are separated considerably, lesions in that area, according to the text, are worse than other areas of the skull.* I did point out the fracture in the frontal sinus to the Judge; that is the same frontal sinus *that they refer to here when they say that 'fracture through the frontal sinus may result in late meningitis.'* There was fracture of the vault of the skull. The fracture ran all the way from the frontal area to the posterior. He had a compound, comminuted, depressed fracture of the skull. Also he had linear fracture reaching from the front of his skull to the back of his skull.

This is page 254 and 255, and I think, with the permission of the Judge, *I would like to just*

*brief this because it is a little boring to read the whole thing. From these pages I glean the following facts: That after an injury of this type headache follows in 67 per cent of the cases. This is intractable in some cases. Also dizziness, ringing of the ears, optic nerve injury, deafness, nervousness, fatigability, insomnia—the percentages are as follows: Dizziness, 60 per cent; ringing of the ears, 9 per cent; optic nerve atrophy, 19 per cent; deafness, 11 per cent; nervousness, 20 per cent; fatigability, 13 per cent; insomnia, 7 per cent. In other words, according to these percentage figures, considering Mr. Rowley's injury, he has a great likelihod of never ever being free of any one of these miserable symptoms * * * There is no other authority I would care to read to the Court in connection with my prognosis."* (Italics ours.) (T. R. 47, 48, 49.)

In his counter-praecipe, appellee sought to include in the record the following papers of record in said cause:

"1. Pages Numbered 534 to 540 inclusive, subentitled 'Fracture of the Skull,' of 'A Textbook of Clinical Neurology, with an Introduction on the History of Neurology,' by Israel S. Wechsler, M. D., Fifth Edition, Revised, 1944, W. B. Saunders Company—All filed in the records of the Court on January 14, 1947, and referred to by District Court in Findings of Fact and Conclusions of Law." (T. R. 171.)

In accordance with the counter-praecipe, the following appears in the transcript of the record, pages 172 through 182:

" 'A Textbook of Clinical Neurology' with an Introduction to the History of Neurology, by Israel S. Wechsler, M. D., Fifth Edition, Revised, published by W. B. Saunders Company, Philadelphia and London, 1944.

Page 534—'Fracture of the Skull.

'Fracture of the skull is accompanied by loss of consciousness in more than 95 per cent of cases. If there is no tearing of the meninges, bleeding within the skull, or compression of the brain, the coma is not deep and consciousness is regained within a few minutes. If there is edema of the brain, with marked compression, particularly on the medulla, the coma is profound and may last hours or days. The pulse is slow, breathing is deep, stertorous or Cheyne-Stokes, the face is flushed, the extremities cold, the pupils at first contracted, later dilated, and fixed. The latter may be unequal, the dilated pupil generally being on the side of the cerebral injury. Should the cerebral compression increase, the patient may die within an hour or linger on for several days without regaining consciousness. He may come out of the coma for a time, then relapse and die of cerebral compression from hemorrhage or edema. The danger signs are deepening of the coma, loss of vesical and rectal control, rise of temperature, fall of blood pressure, and increase in respiratory and pulse rate. In the absence of infection, fever is, as a rule, absent.

'Generally, there is a hematoma over the site of the injury, and sooner or later echymoses about the eyes, mastoid or back of the neck appear. The latter are often present in fracture of the base

of the skull. In such cases, too, one or more of the cranial nerves may be paralyzed. Paralysis of the face is not uncommon if the fracture passes through the petrous pyramid. The cochlear nerve may also be affected and give rise to temporary or permanent deafness. The sixth nerve is not infrequently involved, resulting in internal strabismus and diplopia. Retinal hemorrhages are occasionally present. Fracture through the optic foramen may lead to unilateral optic atrophy and blindness. Fracture of the vault is generally unaccompanied by cranial nerve palsies. Should there be local hemorrhage or focal injury to the brain, irritative signs appear in the form of jacksonian or generalized convulsions, followed by monoplegia or hemiplegia. The local signs and symptoms, such as aphasis, hemianopsia, sensory disturbances, ataxia, etc. (discussed under Focal Diagnosis), differ in no way from those caused by any other lesion. Occasionally there is papilledema, possibly more marked on the side of the injury.

'As the patient recovers consciousness he may vomit. During the gradual recovery there is still clouding of consciousness, and after this is regained there may be complete amnesia. Occasionally one observes delirium or psychotic state, such as is seen in alcoholism or general paresis, lasting from a few hours to several days or even weeks. In the case of frontal lobe lesions, besides the possibility of psychotic manifestations, there may be moria or Witzelsucht, apathy and akinesia. Generally the patient complains of severe headaches, dissiness, and ringing in the ears. If a lumbar puncture is performed the fluid may come out under increased pressure and be mixed

with blood in the case of hemorrhage into the subachranoid space.

'Aside from the possibility of progressive meningeal hemorrhage, which will be discussed separately, infection carried in through the fractured skull may result in pyogenic meningitis (q.v.), in the formation of an epidural abscess or deep-seated abscess of the brain. Should ominous rigidity of the neck set in, the headaches be very severe, p*re*sistent, and localized, or stupor increase, the possibility of these complications must be thought of. But while all these complications may set in early they not infrequently occur weeks or even months after the injury. Traumatic encephalopathy may also be mentioned as a possibility. In many cases there is a proliferative gliosis secondary to the brain injury. Generally, the acute signs and symptoms recede, leaving behind residual manifestations.

'Besides the residual focal paralytic signs the patient often complains of persistent headache, pressure in the head, dissiness; noises in the ears, spots before the eyes, hypersensitiveness to light and sound, poverty of memory, and general mental and physical fatigability. He may be drowsy or complain of insomnia. Glysosuria may follow fracture because of injury to the hypothalamic or interventricular regions (also the floor of the fourth ventricle). The pulse may be slow, the hands tremulous, the reflexes hyperactive. The patient cannot concentrate his attention, and loses his energy; he feels the blood rushing to the head, suffers pain over the heart, is irritable, anxious, moody, or has outbreaks of anger. All or some of these manifestations may persist for a

variable period of time; sometimes there are few or none. Pnuemocephalus (accumulation of air within the cranial cavity) occasionally follows fracture through the sinuses or in other cases where the dura is ruptured. It is characterized essentially by headaches (signs of increased intracranial pressure) and sometimes by rhinorrhea.

'While it is difficult to establish a definite parallelism between the severity of the cerebral injury and the mental symptoms just enumerated, a great many patients who have sustained fractures of the skull show residual emotional and intellectual disturbances. Many have diminished capacity for work, as can be demonstrated by actual tests. Numerous investigators have studied under laboratory conditions the weakened "faculties" of soldiers who received head wounds during the war, and in many cases concluded that the defects could be fairly well correlated with the particular location of the brain injury. Thus, lengthened association time, easy mental fatigability, frequent errors, defective will or inhibition, and diminished power of attention were found in frontal lesions. Less marked but similar intellectual defects were also observed in temporoparietal injuries, while impaired ability in calculation was especially characteristic of occipital lobe defects. Curiously, poverty of attention was found to be greater in occipital than frontal lobe lesions. In general, the higher psychic and intellectual functions were impaired to a greater extent in left-sided lesions of right-handed individuals; this was particularly true of frontal and parietal lobe injuries.

'In addition to the "nervous" complaints, which are undoubtedly due to organic brain changes, a number of hysterical symptoms may be engrafted. Desire for industrial or other compensation, the existence of personal conflicts for which the brain injury offers a compromise outlet, bad advice by lawyers or mismanagement by physicians are frequently the mainsprings of the psychogenic manifestations. Among these may be mentioned exaggerations of actual symptoms, unwillingness to cooperate, and resentfulness. Occasionally one observes hysterical paralyses and anesthesias, mutism, aphonia, stammering, tremors, twilight states, or attacks of unconsciousness, and even convulsions. Most of these symptoms generally appear some time following the injury, after a so-called "incubation period", and are to be observed in 10 to 15 per cent of cases.

'Traumatic epilepsy occurs in a number of persons who have sustained fractures of the skull. The estimates range as high as 30 per cent. This is undoubtedly an exaggeration. Five to 10 per cent is nearer the truth, and then it depends on the nature of the injury. While the convulsions may become manifest soon after the injury, they generally set in a few months or years later. The epileptic attacks are most apt to occur in injuries in or near the motor cortex, but may follow lesions anywhere in the brain. Nor need the original injury have been necessarily severe, although the more extensive the lesion, the more likely the traumatic epilepsy. The convulsions may be jacksonian or generalized; there may be only periodic fainting or merely petit mal attacks. Sensory jacksonian fits may occur in parietal lobe lesions.

Twilight states, periodic alteration of character, fits of bad temper, or affective hyperirritability and other equivalents may represent some of the psychic epileptic manifestations. I have seen narcolepsy follow fracture of the base of the skull.

'Delayed apoplexy (Spatapoplexie) occasionally occurs after trauma to the head. The interval between the receipt of the injury and the acute cerebral hemorrhage is given as from six days to as many weeks. In most of the cases where the connection was established, cerebral vascular disease, namely, arteriosclerosis, was also found, so that the trauma can be considered only as precipitating or exciting and not an ultimate cause. 'Late Complications.—Aside from the occurrence of the late complications such as traumatic encephalitis, abscess, meningitis, and epilepsy, one may also mention cysts of the brain, arachnitis, and serious meningitis. The latter may occur weeks after trauma to the head and give rise to signs of increased intracranial pressure, especially stupor, coma and papilledema. This really is a subdural hydroma (see subdural hematoma). At operation one may find a large amount of serous or blackish serosanguineous fluid, with marked flattening of the brain. Evacuation of the fluid results in recovery.

'Diagnosis.—The diagnosis of fracture of the skull is not difficult. Prolonged unconsciousness, the presence of cerebral nerve palsies, depression at the point of injury, bleeding from the mouth, nose, or ears, and escape of cerebrospinal fluid are fairly strong evidence of fracture. (Bleeding from the orifices caused by local injury is gen-

erally slight and temporary.) But one may exist in the absence of all those signs. Conversely, meningeal hemorrhage alone may give rise to many of the symptoms of fracture, while the presence of blood in the cerebrospinal fluid obtained on lumbar puncture may be evidence of either. None the less, bloody cerebrospinal fluid following a blow to the skull is very significant of fracture. An X-ray examination of the skull, therefore, is always indicated and should never be omitted, if for no other than medico-legal purposes. But a fissured fracture may be present and not be demonstrable on the X-ray plate; it is advisable therefore, to take stereoscopical pictures. Sometimes only necropsy reveals the presence of a fracture. The electroencephalogram may show evidence of an organic lesion of the brain in the case of fracture; improvement in the electroencephalographic tracings runs parallel with recovery.

'Prognosis.—The prognosis varies with the severity and location of the injury to the brain. Immediate or early death occurs in a great many cases. The death rate is high in lesions in the neighborhood of the medulla and frontal lobes. Fracture through the frontal sinus may result in late meningitis. Generally, fractures of the base are more dangerous than those of the vault. Depressed and comminuted fractures offer a worse prognosis than simple fissured ones. Compound fractures carry the possibility of infection and subsequent meningitis or abscess. Loss of deep reflexes, drop in blood pressure, and fixed, dilated pupils are of ominious significance. In general, fractures of the skull are not only immediately

serious, but may leave behind grave and permanent sequels. A great many patients never recover at all. Complete recovery and return to former occupation or previous intellectual vigor is not at all rare. However, recovery may take months or even years, and no definite prognosis can be ventured before all possibility of the occurrence of late complications has passed. Permanent deafness, facial paralysis, ocular palsy- and even optic atrophy may remain after fracture of the skull.

'Treatment—The treatment varies with the type of fracture of the skull and extent of injury to the brain. The first problem is to ameliorate the effect of compression and prevent infection. In simple fracture expectant treatment is the best. The patient is kept in bed, and, if necessary, sedatives (bromides and chloral) are administered. Morphine is generally held to be contraindicated, because it increases intracranial pressure; but it is a question whether there is increased pressure in all cases of fracture. In compound, comminuted, and depressed fractures the wound is exposed and thoroughly cleaned, blood clots, bone splinters, and foreign bodies are removed, and if brain tissue is destroyed it, too, is removed. During the war neurosurgeons practiced wide exposure of compound fractures and thorough removal of all tissue likely to harbor infection—debridement. Most surgeons are of the opinion, and I think justly, that conservative treatment is best, and they defer all operative inference until absolutely necessary. The war, however, taught that radical treatment is preferable in all cases of compound fractures, and, unless the patient is in profound shock, operation

may be immediately performed. Obviously, turning down an osteoplastic flap, removing blood clots, and ligating bleeding vessels are indicated in localizable meningeal hemorrhages. All operations, of course, must wait until shock is over and the patient's condition warrants surgery. In the case of late serous meningitis, or effusions of serosanguineous fluid, repeated lumbar puncture and, if necessary, cerebral decompression is indicated. This is also advisable in case of cerebral edema, although other methods for reducing intracranial pressure also are available. In general, fractures of the base are not accessible to operations and had better be left alone. Operation is naturally indicated when either an epidural or cerebral abscess is present or suspected.

'Spinal puncture is frequently employed both for determining increase in intracranial pressure and reducing it, and for detecting the presence of blood in the case of subarachnoid hemorrhage. Repeated spinal puncture is not necessary. Some surgeons are of the opinion, erroneously, I believe, that lumbar puncture is contraindicated in compound fracture because of the possibility of facilitating infection of the meninges by the reduction of intracranial pressure. The latter can be accomplished effectively by the administration of hypertonic solutions of glucose, salt, or magnesium sulphate (see Tumors of the Brain). Hypertonic solutions are said to be contraindicated in case of shock and hypotension and where there is evidence of severe compression or cerebral contusion. Recent experiments even point to a rise after temporary reduction; hence suggest that lumbar tap is better. Sucrose may be better, as it does not cause a secondary rise. In view of

the fact that meningitis may develop in a certain number of cases, the suggestion has been made that in addition to antitetanus serum antistreptococcus and antipneumococcus serum also be given. The last are no longer necessary, as chemotherapy is more effective; wherefore sulfadiazine or one of the other sulfonamides should be administered.

'The subsequent surgical treatment of late complications, especially of epilepsy, depends on the nature of the lesion. The work of Foerster and Penfield and others indicates its value in selected cases and particularly in those with focal convulsions. Removal of bone defects and meningeal or brain scars may be followed by cure. Sedative therapy should be kept up for a long time after operation. Obviously encephalography should precede operation and, if possible, electrical cortical stimulation for purposes of localization should be done during it. Plastic operations for defects in the skull are occasionally of value, but sometimes aggravate the existing condition. The medicinal treatment is purely symptomatic, and the management of residual paralyses differs in no way from those occurring in the course of vascular accidents (see Apoplexy). The headache and the numerous other "nervous" manifestations are frequently intractable. Lumbar air insufflation has been suggested for the chronic posttraumatic headache. The convulsions are treated in the same way as those occurring in "idiopathic" epilepsy, namely, with phenobarbital, dilantin, bromides, etc. Attempt should be made at reeducation, and psychotherapy employed in the hope that the patient may be restored to a fair degree of usefulness.' "

Following the above quoted material, appears this certificate of the trial Court:

> "The foregoing seven and one-third pages of typewritten matter have been copied from pages 534 to 540, inclusive, of 'A Textbook on Clinical Neurology,' etc., by Israel S. Wechsler, M.D., Fifth Edition, Revised, published by W. B. Saunders Company, Philadelphia and London, 1944, *and are a true copy of the original text of said work considered in arriving at the decision embodied in the Judgment* in the case of Frank Rowley v. Z. E. Eagleston, cause No. A-4239 of the District Court for the Territory of Alaska, Third Division. No other part of said book was considered. The foregoing is the material referred to in the latter part of Paragraph IV of the Findings of Fact in said cause signed and entered on Dec. 27, 1946.
>
> /s/ ANTHONY J. DIMOND,
> District Judge."

(T. R. 182.) (Italics ours.)

Paragraph IV of the findings of fact contains the following:

> "* * * *that in the fixing of said amount of Thirty-seven Thousand Dollars, pages 534 to 540,* inclusive, sub-entitled 'Fracture of the Skull,' of 'A Textbook of Clinical Neurology, with an introduction on the History of Neurology,' by Israel S. Wechsler, M.D., Fifth Edition, Revised, 1944, W. B. Saunders Company, *were considered."* (T. R. 10.) (Italics ours.)

The exceptions taken by appellant to the findings of fact contain the following:

"Defendant excepts to Finding of Fact No. III, wherein the Court finds that plaintiff has suffered damage in the amount of Thirty-seven Thousand Dollars ($37,000.00), * * * on the ground that such finding was based partially upon improper evidence as detailed in paragraph IV of said Findings of Fact." (T. R. 12.)

It is apparent from the foregoing excerpts from the record that the trial Court not only allowed the doctor, under direct examination, to read from a medical textbook into the record, but, in addition thereto, allowed the actual introduction of pages of that work into evidence and then relied heavily thereon in making his findings, conclusions and judgment.

It is almost universally held that such a procedure constitutes prejudicial error.

The general rule recognized in all states in which the question has arisen (except Alabama) is that treatises are not admissible to prove the truth of the statements therein contained.

65 *A.L.R.* 1102;

Jones Commentaries on Evidence (Horwitz), Vol. 3, Sec. 579, p. 742.

One of the recognized grounds for excluding excerpts from medical books and treatises as evidence of the truth of the statements therein contained is that the opportunity for cross-examination is lacking, and the accuracy or exact weight to be given the author's declarations cannot be tested, as is the case with other witnesses.

Some of the cases adhering to the rule stated above are:

U. S. v. One Device, etc. (1947), 160 Fed. (2d) 194, 198;

U. S. v. Paddock (1946), 68 F. Sup. 407, 409;

Union Pac. Ry. Co. v. Yates, 79 Fed. 584, 587;

Samuels v. U. S., 232 Fed. 536;

McEvoy v. Lommel, 80 N.Y.S. 71, 73, 78 App. Div. 324;

Foggett v. Fischer, 48 N.Y.S. 741, 23 App. Div. 207;

Mo. K. & T. Ry. Co. of Tex. v. Robertson (Tex. Civ. App.), 200 S. W. 1120;

Commonwealth v. Sturtevant, 117 Mass. 122, 139;

Boyle v. State, 57 Wis. 472, 478, 15 N. W. 827;

Marsh Wood Products Co. v. Babcock & Wilcox, 207 Wis. 209, 240 N. W. 392, 400;

Winters v. Rance, 125 Neb. 577, 251 N. W. 167, 168, 169;

Percoco's Case, 273 Mass. 429, 173 N. E. 515;

Edwards v. Union Buffalo Mill Co., 162 S. C. 17, 159 S. E. 818, 820;

Baker v. So. Cotton Oil Co., 161 S. C. 479, 159 S. E. 822;

People v. Wheeler, 60 Cal. 581;

Gallagher v. Mar. St. Ry. Co., 67 Cal. 13, 6 Pac. 869;

People v. Goldenson, 76 Cal. 328, 348, 19 Pac. 161;

Lilley v. Parkinson, 91 Cal. 655, 656, 27 Pac. 1091;

Baily v. Kreutzmann, 141 Cal. 519, 521, 75 Pac. 104.

In *Union Pacific Railway Co. v. Yates, supra,* plaintiff offered in evidence and was allowed to read to the jury, certain extracts from a book published by Dr. Erichsen on Concussion of the Spine, Nervous Shock and other injuries to the nervous system. After quoting the portions of the textbook which were read, in its opinion the 8th Circuit Court of Appeals said (page 587):

> "The admission of the aforesaid extracts from the writing of Dr. Erichsen constitutes the chief error that has been assigned. We think that the testimony in question was clearly incompetent when judged by common-law rules of evidence. The authorities, both English and American, are practically unanimous in holding that medical books, even if they are regarded as authoritative, cannot be read to the jury as independent evidence of the opinions and theories therein expressed or advocated. One objection to such testimony is that it is not delivered under oath; a second objection is that the opposite party is thereby deprived of the benefit of a cross-examination; and a third, and perhaps a more important, reason for rejecting such testimony, is that the science of medicine is not an exact science. There are different schools of medicine, the members of which entertain widely different views, and it frequently happens that medical practitioners belonging to the same school will disagree as to the cause of a particular disease,

> or as to the nature of an ailment with which a patient is afflicted, even if they do not differ as to the mode of treatment. Besides, medical theories, unlike the truths of exact science, are subject to frequent modification and change, even if they are not altogether abandoned. For these reasons it is very generally held that when, in a judicial proceeding, it becomes necessary to invoke the aid of medical experts, it is safer to rely on the testimony of competent witnesses, who are produced, sworn, and subjected to a cross-examination, than to permit medical books or pamphlets to be read to the jury. (Citing cases.)"

In *Baily v. Kreutzmann, supra,* where two doctors were permitted to recite instances from medical reports and authors, the California Supreme Court said, at page 521:

> "It has been held, without conflict and in an extended line of cases in this state, that medical works are hearsay and inadmissible in evidence, except perhaps on cross-examination when a specific work may be referred to, it seems, to discredit a witness who has based his testimony upon it."

Nor does the fact that the case at bar was partially tried in the absence of a jury vary the rule. The *Percoco's Case, supra,* was an industrial accident case tried before a trial examiner in the absence of a jury. Nevertheless, after discussing the general rule contended for herein, the Massachusetts Supreme Court said:

> "The admission of this evidence was prejudicial error. The member may have relied on some of

the statements in the treatise, and for this reason the case must be referred to the Industrial Accident Board for rehearing."

The Court will bear in mind that in the case at bar the trial Court positively stated in his findings and in his certificate to the counter-praecipe that he relied upon Dr. Wechsler's Textbook used as evidence herein. (T. R. 10, 182.)

SECOND POINT RAISED.

IT IS PREJUDICIAL ERROR FOR THE TRIAL COURT TO ALLOW THE LIFE INSURANCE AGENT TO GIVE HIS OPINION AS TO APPELLEE'S ABILITY TO OBTAIN LIFE INSURANCE IN THE FUTURE.

6. That prejudicial error was committed in admitting into evidence, over the objection of appellant, the opinion of a life insurance agent as to appellee's ability to obtain life insurance.

Hugh Daugherty testified that he had been a life insurance agent for about ten years and that he had had experience in gathering and interpreting actuarian data. (T. R. 132.) After introducing into evidence certain mortuary tables which indicated that the life expectancy of a man the age of appellee is 27½ years, the following transpired:

"Mr. Hellenthal. Now, Mr. Daugherty, could a man who had suffered a compound, compressed, depressed fracture of the skull obtain life insurance?

Mr. Curry. We object, if the Court please. The witness hasn't qualified yet as any expert to pass upon the subject; and it is immaterial.

> The Court. Objection overruled.
>
> Witness. I would answer that 'No,' that there would be no possibility of that man obtaining insurance." (T. R. 136.)

Undoubtedly the trial Court relied on this testimony in making his decision herein as he specifically refers to the life insurance data in his finding. (T. R. 10.)

It is apparent, from the record, that Mr. Daugherty was not qualified to pass upon appellee as a life insurance risk, nor was such evidence admissible.

New York Life Ins. Co. v. Long, 199 Ky. 133, 250 S. W. 812;

Schwarzbach v. Ohio Valley Protective Union, 25 W. Va. 622, 52 Am. Rep. 227;

Rawls v. Amer. Mut. Life Ins. Co., 27 N. Y. 282, 84 Am. Dec. 280;

Mut. Life Ins. Co. v. Mechanics' Savings Bank & Trust Co., 72 Fed. 413, 429.

In the *Rawls* case, *supra,* insurance experts and doctors were allowed to testify that because of excessive use of intoxicating liquor a man would not be a desirable life insurance risk. In commenting on this evidence, the Supreme Court of New York said (p. 293):

> "This testimony was incompetent, both on principle and authority. It was of no consequence what, in the opinion of these physicians in certain cases, and under a certain state of facts, would be a good or bad risk for a life insurance company to take, or what circumstances should be

considered on the question of increasing or lessening the rates of insurance. These witnesses might give their opinion on matters of science connected with their profession; but were not receivable to state their views of the manner in which others would probably be influenced, if certain specified facts existed."

The following language taken from the *New York Life Insurance Company* case, *supra,* is especially applicable to the witness Daugherty.

p. 814: "A local life insurance agent whose only connection with that business was shown to be a solicitor of policies, was introduced and allowed to give his opinion as to the materiality of the proven false answers and to state that, according to his opinion, life insurance companies generally, and especially the defendant * * * would accept the application and issue the policy * * *."

"It seems to us that the incompetency of that testimony is so apparent that we need take but little time or space in its discussion. None of the witnesses qualified themselves as experts in passing upon the desirability of risks by those engaged in the life insurance business, or showed a familiarity with facts and conditions entering into the determination of that question. * * * clearly, a witness not engaged in the business of determining such matters is wholly incompetent to give his opinion concerning them, and the court erred in admitting the testimony over defendant's objection and should have excluded it on its motion made for that purpose."

THIRD POINT RAISED.

THE DAMAGES AWARDED HEREIN ARE EXCESSIVE.

7. **The trial Court erred in its finding "That plaintiff has been injured in the premises in the amount of thirty-seven thousand dollars ($37,000.00), all in actual or compensatory damages;" for the reason that the sum mentioned in said finding is excessive and not justified by the evidence introduced in the trial of said cause, to which judgment appellant excepted.**

8. **That the trial Court's conclusion of law and judgment are erroneous in finding that appellee is entitled to judgment in the sum of thirty-seven thousand dollars for the reason that said sum is excessive and not justified by the evidence introduced in the trial of said cause, to which judgment appellant excepted.**

The Court awarded appellee damages in the sum of $37,000.00. Although exemplary damages were prayed for in appellee's amended complaint, the trial Court specifically limited damages to "actual or compensatory damages." (T. R. 9.)

Appellee was injured on July 30, 1946. (Crim. T. R. 48; T. R. 31.)

He was in the hospital for twenty-two days, being released therefrom on August 21, 1946. (T. R. 40.)

He verified his original complaint in the civil action on September 10, 1946. (T. R. 3.)

He testified before the grand jury on October 1, 1946. (Crim. T. R. 32, 180.)

The criminal trial lasted from November 4th to November 14, 1946 (Crim. T. R. 42, 425) and appellee actively participated therein. (Crim. T. R. 170-188, 341-342.) He also participated in the civil trial. (T. R. 107-119, 120-122.)

In the civil trial, appellee gave a complete resume of his life, explaining in detail his schooling, his job experience and his earnings. (T. R. 107-115.)

He suffered a compound, comminuted, depressed fracture of the skull (T. R. 31) necessitating an operation to reduce the fracture, remove a number of fragments of the bone from the brain, replace some bone fragments and close the wound. (T. R. 32.) About two-thirds of an ounce by volume of destroyed brain tissue was removed from the wound. (T. R. 32, 33.)

Following the injury his condition continually improved, so that at the time of the trial his injuries were evidenced only by his subjective symptoms, i.e., his complaints of headache, ringing of the ears and dizziness. (T. R. 80, 81.) He had normal equilibrium; he was mentally in touch with his environment; was coherent and had good coordination. (T. R. 75, 80, 81, 84.) He had no loss of strength nor loss of reflexes. (T. R. 75, 76, 84.) His appetite was good and his weight had increased. (T. R. 83.) There is no substantial conflict in the record between the doctors as to appellee's objective symptoms and his physical appearance.

All four of the doctors who testified agreed that appellee should attempt to return to work. (T. R. 49, 66, 72, 73, 93.) None of the doctors would predict as to how long appellee would be prevented from resuming his regular employment. (T. R. 49, 66, 72, 73, 94.)

Appellee's expenses were found by the trial Court to amount to $1494.25 (T. R. 9) and the trial Court

expressly limited any consideration of loss of profits from the operation of appellee's business as an element of damage. (T. R. 9, 10.) The award of $37,000, with the exception of the medical expense of approximately $1500, is, therefore, expressly limited to the pain and suffering flowing from his wounds, and consideration of the discomforts resulting from his subjective symptoms of headaches, ringing of the ears and dizziness.

Appellant submits that under the authorities an award of $37,000 for the injuries sustained by appellee is excessive.

In *Daraska v. Dauksha* (1945), 327 Ill. App. 333, 64 N.E. (2d) 204, an award of $2000 was given for injuries including a fracture of the skull, swelling, bulging and discoloration of the right eye causing a loss of approximately $600 in salary and confinement to the hospital for three weeks for a woman who had been earning an average of $30 a week.

In *McMullen v. U. S.* (1947), 75 Fed. Sup. 164 (in which judgment was rendered by the Court, sitting without a jury), a twenty-six year old woman sustained a fracture of the pelvis and left ankle, a brain concussion, permanent hematoma on the left thigh, and a one-inch shortening of the left leg. She was confined to the hospital for nearly six months, required to wear a walking caliper thereafter and was unable to work for five months after leaving the hospital. The Court awarded her $10,000 damages, plus a hospital bill of $1251.25 and wage loss of $1518.00.

In *Richter v. Hoglund* (1943), 132 Fed. (2d) 748, one of the plaintiffs sustained the following injuries in an automobile accident: rendered unconscious until the day following the accident; necessary to strap him to the bed; suffered great shock; was unable to work an entire summer; suffered a concussion of the brain resulting in a defect in equilibrium. At the trial he was suffering from headache, dizziness and backache; he had three large cuts on his face, resulting in scars, one of which disfigured his left ear. He had complete loss of muscle control of the left half of his forehead—muscle paralysis. He had an area of hyperesthesia (sensitiveness) in front of his ear. There was a large area between his eye and ear in which there was no sensation whatever. He sustained great pain and suffering.

The jury returned a verdict of $15,379.70. The trial Court reduced this to $15,000.

The other plaintiff sustained a head injury; a cut across his nose and a fracture thereof, displacing the septum to the right which almost completely obstructed breathing through the right nostril. He had headaches and dizzy spells for a year. There was a piece of steel imbedded in his skull which should be removed. The jury gave him a verdict of $4697 which the trial Court reduced to $4000.

With respect to this judgment, the Circuit Court of Appeals (C.C.A. 7th) said:

> "*While this verdict is substantial for the injuries received,* we do not think it so excessive as to

indicate undue prejudice, passion or corruption on the part of the jury." (p. 752.) (Italics ours.)

In *Kambourian v. Gray* (Oct. 1947), 81 A.C.A. (Cal.) 941, 185 Pac. (2d) 27, which was an action for damages for assault and battery, the plaintiff sustained lacerations of the left ear and left eye and a severe concussion. Eighteen months after the injuries, plaintiff still had severe headaches, vertigo and nervousness, and there was medical testimony that there was a permanent injury to the brain which would not get better and which would probably get worse. There was definite impairment of plaintiff's ability to work. The jury returned a verdict of $20,000 general damages and $5000 exemplary damages. These amounts were reduced by the trial Court to $5000 and $1000 respectively. Commenting on the action of the trial Court in reducing the verdict, the Appellate Court said, page 947:

"The trial judge properly exercised his discretion in reducing the judgment upon motion for a new trial, *and we are satisfied from the record that he exercised it wisely.*" (Italics ours.)

In *Bacas v. Laswell* (La. App. 1945), 22 So. (2d) 591, 595, the Court said:

"We finally consider the quantum of damages. The wounds received by plaintiff were very serious and both litigants are, indeed, most fortunate that death did not result. During the time he was in the hospital, plaintiff was given at least eleven blood transfusions and his spleen was removed.

> Other injuries were—diaphragm fractured; lung punctured; left arm fractured, resulting in the paralysis of some of the muscles of the arm and hand and there still remains a bullet in plaintiff's back near his spine. Prior to the accident, plaintiff was a skilled workman, a shipwright, being in charge of a crew of shipfitters. As a result of the wounds he received, he has been unable to resume his normal occupation although he is a comparatively young man (43 years of age)."

The trial judge, evidently taking into consideration the poor financial condition of defendant, awarded plaintiff $3155. The Appellate Court, holding that this award was inadequate, increased the amount to $6000, after giving consideration to the defendant's ability to respond.

In *Willis v. Perinoni* (1929), 97 Cal. App. 764, 276 Pac. 359, plaintiff suffered a fractured skull and permanent injuries impairing his efficiency as a carpenter; affecting eyesight and causing numbness in his limbs. These injuries resulted from a malicious assault by the defendants with an iron bar. Both exemplary and actual damages were demanded.

An award of $5000 for these injuries was held not excessive.

In *Davis v. Randall* (1931), 17 La. App. 291, 135 So. 727, 728, the injuries and resultant damages awarded were described by the Appellate Court as follows:

> "The record shows that plaintiff expended on his son for doctor's, medical, and hospital bills, etc.,

the sum of $416.50, and the judgment in favor of plaintiff individually for that amount is correct. The amount of $1,583.50 awarded for the use and benefit of the minor, Wayne Davis, we think is entirely inadequate to cover the injuries received, the suffering and the humiliation. It is conclusively shown that Wayne Davis' skull was fractured in two places, and that, after a period of some three months after the assault and beating were administered to him, he began having a form of epileptic fits every time he would get the slightest tap on the head, or become overheated, and the fits grew worse and more prolonged each time, until some time in August, over a year after the assault, he had to be operated on and have a portion of his skull removed and the bloody water drained from his brain; and that, as a result of that operation, he has lost a year from college, and will be unable to do anything for a period of from twelve to eighteen months following the operation.

It is also shown that he was beaten about the back and hips, and that he could not stand on one foot for several days immediately following the beating; and that this unmerciful, unprovoked, and malicious assault took place in the presence of some eight or ten of his friends and associates, naturally causing him great humiliation, as well as pain, suffering, and permanent injury. It is shown that, while the doctors are of the opinion that he will finally recover from the operation performed on him, he has a small unprotected hole in his skull, where an opening had to be drilled in connection with the operation, and that he will always have the fear of a possible recurrence of

the epileptic fits, which the doctors say may happen.

We think a judgment for his use and benefit of $5,000 wil be adequate."

The Court will note that all of the above cases, with the exception of the *Davis* case, were decided in 1929 or in the period between 1943 and October of 1947. The judgment in the instant case was rendered in December of 1946. The economic condition of the country and the actual value of the dollar were substantially the same when the cited cases were decided as were conditions when the present judgment was entered.

The injuries in all the above cited cases were substantially more severe than those sustained by the appellee in the case at bar, yet in no case did the award granted by either the trial or the Appellate Court ever approach the figure of $37,000 awarded in this case. The error becomes even more apparent when we recall that there were no exemplary, but only compensatory damages awarded.

Speculative Future Damages.

Concerning the probability of permanent injury to appellee as the result of his injuries, Dr. Romig testified that appellee might have no end to his subjective symptoms of headaches, ringing of the ears, dizziness, nervousness, etc.; that these symptoms might become worse and that epilepsy could ensue. The doctor's opinion on epilepsy was based largely on Wechsler's

Textbooks, heretofore discussed. He then testified that appellee could go through life without epilepsy; that the continuation of the subjective symptoms might not happen, but that he would always have *some measure* of his present discomfort. (T. R. 45, 46.) He stated that appellee could not return to regular work at the time of the trial and that he could not say when he would be able to return to his regular job; that he, however, had advised appellee to work. (T. R. 49.)

Dr. Walkowski said that appellee's headaches and dizziness could continue, but he would not estimate for what length of time. He found no symptoms of epilepsy (T. R. 60) and was unable to state any possibility of insanity. (T. R. 62.) He was not in a position to state how much work appellee might be able to do. (T. R. 66.)

Dr. Coffin had no opinion as to a specified time when appellee's symptoms might stop. (T. R. 73.)

Dr. Davis stated he might have subjective symptoms for a year (T. R. 94) and might be hampered by headaches, ringing of the ears and dizziness, but that he would be physically able to work. (T. R. 95, 96.) He stated that appellee would not have a generalized epilepsy in the future; that he would have no contractures, and that there was no possibility of his acquiring meningitis (T. R. 100) or insanity. (T. R. 104.)

Appellant submits that the testimony above outlined is insufficient to sustain any portion of an award of $37,000 for future consequences of the injuries.

"To entitle a plaintiff to recover present damages for apprehended, future consequences, there must be evidence to show such a degree of probability of their occurring as amounts to a *reasonable certainty* that they will result from the original injury." (Italics ours.)

Bailey v. Yosemite Portland Smith Corp., 136 Cal. App. 111, 28 Pac. (2d) 65;

Silvester v. Scanlon, 136 Cal. App. 107, 28 Pac. (2d) 97.

"The respondent's own physician testified only to a *possibility* of permanent disability. Under Section 3283 of the Civil Code, 'Damages may be awarded in a judicial proceeding, for detriment resulting after the commencement thereof, or certain to result in the future.' By this section, in an action for personal injuries the recovery is limited so far as physical suffering, or pain, or mental anguish are concerned to compensation for the consequences which have occurred up to the time of the trial, or *it is reasonably certain* under the evidence will follow in the future." (Italics ours.)

Bellman v. S. F. High School Dist., 11 Cal. (2d) 576, 588, 81 Pac. (2d) 894.

"To justify a recovery for apprehended future consequences, there must be evidence by such a degree of probability of occurrence as amounts to a *reasonable certainty* that they will result from the injuries alleged." (Italics ours.)

Sherman v. Frank (1944), 63 Cal. App. (2d) 278, 285, 146 Pac. (2d) 704.

To the same effect:

Matthews v. A. T. & S. F. Ry. (1942), 54 Cal. App. (2d) 549, 560, 129 Pac. (2d) 435.

Appellant earnestly contends that none of the testimony in the case at bar will sustain a finding of reasonable certainty of future permanent injury to appellee.

The damages for the period from the injury to the time of the trial consist of $1500 medical expenses, loss of earning for four and one-half months, and pain and suffering. By no stretch of the imagination could these damages justify an award of $37,000.00.

The Nature of the Altercation Between the Parties Should Be Considered by the Court in Awarding Damages.

There is considerable evidence in the record that appellee provoked the altercation and voluntarily entered into a fist fight with appellant (Crim. T. R. 90, 96, 127, 249, 279, 416, 417.) Moreover, the conflict took place on appellant's premises where appellee had gone and engaged in an argument over the price of an oil tank. (Crim. T. R. 190, 191, 249, 416.)

Under these circumstances, the Court should have considered appellee's actions in awarding damages.

Cornell v. Harris, 60 Ida. 87, 88 Pac. (2d) 498;

City of Gaffney v. Putnam, 197 S. C. 237, 15 S.E. (2d) 130;

Exposition Cotton Mills v. Crawford, 67 Ga. App. 135, 19 S.E. (2d) 835;

Barholt v. Wright, 45 Oh. St. 177, 12 N.E. 185.

The award of $37,000 clearly indicates that the trial Court gave no consideration to these mitigating circumstances.

For the reasons cited appellant contends that the damages awarded are excessive to a degree that requires reversal of the judgment herein.

CONCLUSION.

In summarizing, appellant submits:

I.

The trial Court committed prejudicial error in allowing excerpts from a medical textbook to be read into evidence as part of appellee's case in chief; in allowing pages from said textbook to become part of the record herein, and in considering and relying upon the content of said medical textbook in arriving at the damages awarded appellee herein.

II.

The trial Court committed prejudicial error in allowing a life insurance agent to give his opinion, in evidence, as to appellee's ability to obtain life insurance, inasmuch as said agent was in no sense qualified to give such testimony. In addition, the evidence so offered by the life insurance agent was clearly incompetent.

III.

The award to appellee of $37,000 as actual or compensatory damages was excessive and is not justified nor supported by the evidence herein.

For the foregoing reasons, we believe that the judgment should be reversed.

Dated, San Francisco, California,
May 20, 1948.

Respectfully submitted,
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No. 11,807

IN THE

United States Court of Appeals

For the Ninth Circuit

Z. E. EAGLESTON,
Appellant,

vs.

FRANK ROWLEY,
Appellee.

BRIEF FOR APPELLEE.

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No. 11,807

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Z. E. EAGLESTON,
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BRIEF FOR APPELLEE.

JURISDICTIONAL STATEMENT.

The statement of jurisdiction is properly set forth in brief for appellant (p. 1).

GENERAL STATEMENT AS TO SCOPE OF APPELLEE'S BRIEF.

At the outset of the trial, counsel for appellant offered to stipulate that the case be tried before the Court (T.R. 26). Counsel for appellee, after procuring time to consult with his client, concurred with counsel for appellant and with the consent of the Court, the parties stipulated as outlined in brief for appellant, at page 3 thereof.

This brief is chiefly concerned with the question of damages, hence, in the main, in the following statement of evidence, the evidence is stated that bears on that subject.

It must be borne in mind that the same judge heard the criminal case, No. 11,545, with jury, as heard the civil case, No. 11,807, without jury, and that the criminal case was tried beginning November 5, 1946 and the civil case began shortly thereafter, namely, on December 9, 1946.

APPELLEE'S STATEMENT OF EVIDENCE.

Appellee suffered a compound, comminuted, depressed fracture of the skull (T.R. 31). He was treated for the fractures, laceration of the brain, laceration of the dura, hemorrhage, shock, laceration of the scalp (T.R. 31). Brain tissue was destroyed and exuded from the wound (T.R. 32, 79). There were a considerable number of small fragments of bone removed from Mr. Rowley's brain (T.R. 32-33). About two-thirds of one ounce by volume of destroyed brain tissue was removed (T.R. 33). Some bone fragments were replaced on top of the dura after cleaning in the hope that they would grow over the defect in the man's skull; some were thrown away (T.R. 33). The length of the wound or laceration was 3¼ to 3½ inches long (Crim. T.R. 296, 301; T.R. 72, 79).

A great many fragments lay in the brain substance itself, completely through the dura and in the brain substance. The deepest fragment removed from Row-

ley's brain was one and one-quarter inch below the outer table of bone—one and one-quarter inch below the outside of the skull (T.R. 33).

There is an area between the size of a quarter and the size of a fifty cent piece of Rowley's brain that is uncovered by bone (T.R. 38, 85, 86).

The injury was on the right side of the brain in the front parietal area rather close to the motor area (T.R. 33, 39, 44, 58) and covering the frontal lobe (T.R. 47). There was a fracture in the frontal sinus. The fracture ran from the frontal area to the posterior. There was a stellate fracture radiating at different points in addition to the compound, comminuted, depressed fracture at the site of the application of the force (T.R. 93).

At the time of the trial Rowley complained to his doctor of dizziness, headache, ringing in his ears, a sensation of staggering or giddiness, inability to concentrate without a headache, inability to function mathematically almost totally at times, increased fatigability as far as work is concerned (T.R. 41). All these symptoms were unsolicited (T.R. 48). He also complained to his doctor at the time of the trial of nervousness and insomnia (T.R. 48). His headaches were frequent and he said to Doctor Romig that he has never been more than two days free from headache (T.R. 48). Doctor Romig noticed that Rowley's mental capacities had been dulled (T.R. 41); so did Rowley (T.R. 117); his friend Robert Risley stated that he does not seem to be the same since the injury (T.R. 137); so did his friend A. H. Dyer who

testified he was not as alert or as quick and his mind seems preoccupied and he didn't pay the proper attention to traffic (T.R. 138); so did his wife, Vena Rowley, who testified that he responds more slowly when spoken to, takes longer thinking, seems to be hard of hearing—he just seems slower and harder to draw his attention (T.R. 139).

Dr. Romig stated:

Based upon my diagnosis and study of the text you have mentioned, and my experience as a surgeon and physician, my prognosis in this particular case of Mr. Rowley is unfavorable. I mean that Mr. Rowley may have no end to his headaches, to his dizziness, to the ringing in his ears, to his nervousness, to his fatigability, and his nightmares and insomnia. He may have no end to these. They may, in fact, become worse. Not only could he have those complications, but epilepsy, for example, could ensue. Wechsler's Textbook places that at five and ten per cent up to thirty in severe injuries. By that I mean that the outcome of epilepsy depends in large measure upon the amount of brain tissue destroyed and the proximity of the damaged brain tissue to the motor centers. By Wechsler placing it at 10 to 30 per cent, they estimate that a man with a severe head injury has about a 10% chance of becoming a confirmed epileptic, and in some types of injury, but not specifically the one involved, it is even known to be higher. Not only could he have that as a complication, but he could have, even at a late date, meningitis—inasmuch as it communicates with the sinus, he could even have

a brain abscess. Mr. Rowley's condition is no better, in fact, since he left the hospital. It is also possible that Mr. Rowley could go through the remainder of his life without any epilepsy. When I speak of prognosis of epilepsy, and these various disorders I have described, I do not mean it is going to happen, but in my opinion Mr. Rowley will never be free of some measure of his present discomfort. Those discomforts that he suffers now are headaches, dizziness, ringing in the ears, nervousness, fatigability, sleeplessness, and he has the one positive finding of diminished cerebration. Mr. Rowley is not mentally as capable now as I have known him before. I would say I have known him eight years (T.R. 45-46).

The lesion in this injury occurred in the frontal area, rather close to the motor cortex. That is back close to the mid portion of the brain. It roughly covers the frontal lobe. When they said the death rate is high in lesions in the neighborhood of the medulla and frontal lobes, they mean the same frontal lobes I am now speaking of. While the medulla and frontal lobes are separated considerably, lesions in that area, according to the text, are worse than other areas of the skull. I did point out the fracture in the frontal sinus to the judge; that is the same frontal sinus that they refer to here when they say that "fracture through the frontal sinus may result in late meningitis". There was a fracture of the vault of the skull. The fracture ran all the way from the frontal area to the posterior. He had a compound, comminuted, depressed fracture of the skull. Also he

had linear fracture reaching from the front of his skull to the back of his skull (T.R. 47-48).

In other words, according to these percentage figures, considering Mr. Rowley's injury, he has a great likelihood of never ever being free of any one of these miserable symptoms. He has at the present time headache, dizziness, ringing of the ears, nervousness, fatigability, and insomnia (T.R. 48).

I mean Mr. Rowley cannot hold a job in my opinion. I do not know that he will ever be able to hold a job. However, I would not be surprised if he could. The outlook as far as that is concerned is rather indefinite (T.R. 49).

I expect Mr. Rowley to be in the hands of a physician for a long time on account of his present difficulty. By a long time I mean—well, it is indefinite, but I would say no man with this significant head injury could ever hope to escape a doctor's care for years and years (T.R. 50).

The three doctors, Walkowski, Coffin and Davis, were appointed by the Court the day before their testimony was given, to observe Rowley (T.R. 58). They corroborated Romig's testimony in the main. Dr. Romig treated Rowley from the day of the injury until the trial (T.R. 31; Crim. T.R. 302).

Dr. Walkowski stated there may be a possibility of epilepsy (T.R. 60); that there was a possibility of air entering the cranial vault, possibly resulting in infection, compression of the brain and even cause death (T.R. 61). Dr. Walkowski corroborated Dr. Romig's

testimony as to the extent of the fracture and as to the fracture into the frontal sinus (T.R. 62). He corroborated Romig's statement that Rowley's arithmetic and mental processes were retarded and confused (T.R. 62); stated that personality changes could result and that another operation might be necessary if the present symptoms persist, and they might not stop a year from now (T.R. 62, 63).

Dr. Coffin's diagnosis, after examining Rowley upon Court order, was a post-traumatic fracture of the skull and laceration of the brain tissue with residual symptoms consisting of hypertension, high blood pressure and an impairment of mental and physical efficiency. The prognosis as to life is good, but prognosis as to full recovery of complete mental, emotional and physical efficiency would be rather poor. He recommended irregular work at Rowley's discretion and further specialized medical treatment (T.R. 72, 73). His symptoms might continue ten years and might become aggravated and more persistent. His injury could result in personality change (T.R. 73). There is possibility of epileptic form of seizures if the wound healed improperly (T.R. 75). His symptoms might become worse (T.R. 76).

Dr. Davis in the main corroborated the findings of the other doctors as to subjective symptoms of headaches, ringing of the ears, dizziness. Dr. Davis is deaf (Crim. T.R. 367). Dr. Davis was a witness for the defendant at the criminal trial (Crim. T.R. 367) and had been asked to care for Rowley at the request of Eagleston on the day of the injury (Crim. T.R.

378). Dr. Davis stated that Rowley's brain injury was severe (T.R. 90); that Rowley's symptoms of headache and vertigo might continue for an indefinite period (T.R. 103); he might have petit mal (T.R. 100).

At the time of the injury and for a year and one-half prior thereto, as electric motor repairman, appellee earned approximately $400.00 per month (T.R. 113). During the war appellee earned $450.00 per month as electric motor repairman for the Army.

It was shown that Rowley's age was 41 (T.R. 107) and his life expectancy was 27½ years; that the present value of an annuity that would bring Rowley $400.00 per month for the rest of his life based on the life expectancy and annuity tables was $122,892; $300.00 a month, $92,169; $200.00 a month, $61,446; and $100.00 a month, $30,723 (T.R. 134, 135).

The doctors agreed that the brain injury suffered by Rowley was extremely severe (T.R. 50, 62, 90).

Rowley testified it hurt his head to concentrate and that he couldn't concentrate; that he had trouble sleeping and had bad dreams (T.R. 117); that he suffered much pain at the time of the injury and since (T.R. 120); that the future worries him to a certain extent (T.R. 121).

"I have suffered much pain at the time of this injury and since. The first two or three days in the hospital, I do not remember a whole lot what took place. There is a few instances that I do remember

but I—I do not remember but very little the first three or four days, and then I seemed to gradually get better, but my head hurt and mostly—well, it hurt until I got out of the hospital, and then it hurt mostly when I tried to do any thinking or anything. I couldn't do very much thinking. It was best to relax. I always felt better when I really fully relaxed, because when I get in a strain or try to think, why, I get severe headache, and that hurts." (T.R. 120, 121).

Rowley was hospitalized 29 days (T.R. 115-116). He did very little work since getting out of the hospital (T.R. 116). I can't do any lifting—I have—that is absolutely—I have tried to do so, but I can't do it, that is all (T.R. 116). He doesn't think he can climb telephone poles and doesn't want to try (T.R. 116). He feels off balance at times (T.R. 117). Dr. Romig corroborates this; he feels he is going to stagger . . . if you feel that unsteady you do not walk well (T.R. 54). I don't feel like I could go back to my regular work at the Post, because I could not do any lifting, and I do not believe I could stand eight hours standing up to a bench working. I don't believe I could anyways near stand it (T.R. 117).

Rowley earned nothing from the date of the injury until time of trial (T.R. 118). Since this injury I have not been able to do as much work as I did in my spare time prior to the injury (T.R. 118).

Rowley's work in life is that of a shop electrician (T.R. 124); this work requires prior knowledge and experience, the exercise of judgment and discretion

and the use of various types of meters and the calculations that go with them (T.R. 125).

If Rowley gets over tired his head aches at the point of injury (T.R. 116). When he gets tired he lies down and rests. He does this for his headaches (T.R. 116, 117).

There is scar tissue over Rowley's brain (T.R. 43, 50, 53, 62, 74).

The area of Rowley's skull that was denuded of bone was not covered at the time of the trial (T.R. 52); it is doubtful whether the replaced bone tissue will grow and ever cover the denuded area (T.R. 51, 52). Dr. Romig believed it to be impossible (T.R. 52). Dr. Davis stated that when he palpated Rowley's scar it seemed firm except in an area just above the region of the hair line which had less resistance than the posterior part of the scar and the anterior part of the scar. When I pressed upon this he gave evidence of—not—of desiring that I should not press on it—he said that caused pain (T.R. 82-83).

All doctors believed Rowley was not a malingerer (T.R. 50, 55, 63, 74, 93).

Dr. Walkowski testified that in some cases personality changes evolved from operations on the frontal lobe of the brain (T.R. 70). So did Dr. Coffin (T.R. 73).

ARGUMENT.

FIRST POINT RAISED.

WHEN THE TRIAL COURT CONSIDERED EXCERPTS FROM A MEDICAL TEXTBOOK AS PART OF APPELLEE'S CASE AND RELIED THEREON IN PART IN MAKING ITS FINDINGS, CONCLUSIONS, AND JUDGMENT, ERROR, IF ANY, WAS ABSENT BECAUSE APPELLANT EXPRESSLY CONSENTED TO THIS PRACTICE, AND MOREOVER SUCH EVIDENCE WAS CUMULATIVE.

1. The two attorneys for appellant not only failed to object properly to this testimony but expressly, clearly, affirmatively and unequivocally consented to the trial Court considering the text in question, namely Wechsler's Textbook of Neurology.

2. The trial Court did not admit into evidence pages 534 to 540, inclusive, sub-titled "Fracture of the Skull" of "A Textbook of Clinical Neurology, with an Introduction on the History of Neurology", by Israel S. Wechsler, M.D., Fifth Edition, Revised, 1944, W. B. Saunders Company.

During the course of the trial the following occurred (Transcript of Proceedings, pages 31, 32 and 33):

"Q. Now Doctor, based upon your diagnosis consisting of symptoms and findings, what is your prognosis—first defining that term for the benefit of the Court and myself?

A. The prognosis is to be called the outlook in Mr. Rowley's case, what he can expect and how comfortable he will be or how uncomfortable he will be.

Q. Now, is your prognosis, based—in addition to being based upon your diagnosis, is it based upon the study of any particular medical authority?

A. Yes, it is in some measure based on my recent study of Wechsler's Textbook of Neurology.

Q. Who publishes that text?

A. I don't know.

Q. I will hand you Wechsler's Textbook of Clinical Neurology and will you identify it? Tell me who published it, and when?

A. This is a 1944 edition of Wechsler's Textbook of Neurology published by W. B. Saunders and Company.

Q. Is your prognosis based upon the study of any additional text?

A. Yes, it is.

Q. What is that text?

A. Gray's Text—Attorneys Textbook of Medicine by Gray.

Q. What edition?

A. This is a 1940 edition, published by Matthew Bender and Company.

Mr. Hellenthal: I now offer in evidence, subject to removal of pertinent extracts, these two texts. (Handed them to Mr. Grigsby.) Does counsel for the defendant have any objection?

Mr. Grigsby: We object to them as exhibits, your Honor, because, as I remember the rule, textbooks are inadmissible. But we have no objection to the Court consulting any work that he desires—researches on this case. As exhibits we object to them.

Mr. Hellenthal: I introduced them qualifiedly as exhibits and I will withdraw the offer to introduce the entire text and accede to Mr. Grigsby's state-

ment that—I merely offer them for the consideration of the doctor and the Court.

Court: Very well, I understand the proffer is withdrawn and that counsel for the defense have no objection to the Court considering these texts.

Mr. Grigsby: Nor any other texts."

The above quoted matter did not appear in the Bill of Exceptions served upon counsel for appellee and was entirely omitted therefrom. Prior to settling the Bill of Exceptions, the following was included in a paper served upon counsel for appellant, entitled "Plaintiff's Proposed Amendments to Proposed Bill of Exceptions", which was filed with the District Court, Third Division, Territory of Alaska, on 3 September, 1947, and agreed to by counsel for appellant and inserted in the Bill of Exceptions at page 16, line 11, of the typewritten copy thereof:

> "Whereupon counsel for defendant, George B. Grigsby, indicated that the defense had no objection to the Court considering Wechsler's and Gray's texts, nor any other texts."

It thus clearly appears that appellant consented to the trial Court "considering" the Wechsler's text and to allowing Dr. Romig to refer to and quote this text in his testimony.

In the Assignment of Errors, no specific mention is made of the trial Court's considering Wechsler's text (T.R. 15, 16, 17, 18); nor is specific mention made of this alleged error in the Exceptions (T.R. 12, 13).

3. *The express waiver of objection to the Court's consideration of matters which would be inadmissible as evidence precludes appellant from objecting on appeal.*

a. 53 *American Jurisprudence,* par. 143, page 127:

> "If when inadmissible evidence is offered the party against whom such evidence is offered consents to its introduction, or fails to object, or to insist upon a ruling on an objection to the introduction of such evidence, and otherwise fails to raise the question as to its admissibility, he is considered to have waived whatever objection he may have had thereto, and the evidence is in the record for consideration the same as other evidence."

b. *Diaz v. United States,* 223 U. S. 442. The syllabus of this case states:

> "When evidence taken elsewhere is admitted generally and without restriction by consent of the accused, it is not subject to the objection that it is hearsay."

At page 450 of the *Diaz* case, supra, the Court states:

> "True, the testimony could not have been admitted without the consent of the accused, first, because it was within the rule against hearsay and, second, because the accused was entitled to meet the witnesses face to face. But it was not admitted without his consent, but at his request, for it was he who offered it in evidence. So, of the fact that it was hearsay, it suffices to observe that when evidence of that character is admitted

without objection it is to be considered and given its natural probative effect as if it were in law admissible."

c. *Thompson v. Thompson,* 91 Ala. 591, 8 So. 419, 11 L.R.A. 443. The syllabus of this case, as stated in 11 L.R.A. 443, states:

"An agreement that certain papers may be read in evidence is a consent that they shall be considered as legal evidence in the case."

d. *American Petroleum Co. v. Missouri Pac. Ry. Co.,* 25 F. (2d) 441. The syllabus of this case states:

"Stipulation of parties that either party might produce witnesses who could testify to statements taken from their books and records, and that statements might be introduced in evidence, precluded objection to statements introduced on grounds of incompetency or as not best evidence attainable."

e. *Missouri K. & T. Ry. Co. v. Elliott et al.,* 102 Federal Reporter 96; (affirmed U. S. Sup. Ct., 184 U. S. 695), particularly at pages 105 and 106. The Court states at page 106:

"The admission of incompetent evidence of a material fact is an error without prejudice, where the fact is proved by other competent evidence (Cooper v. Coates, 21 Wall. 105, 22 L. Ed. 481), or the party complaining of the error was instrumental in excluding competent evidence to prove the fact (see authorities supra), or where the fact is one of common knowledge."

f. 64 *Corpus Juris,* at page 167, Section 189 (2), states:

> "Where a party consents to the admission of evidence, he cannot thereafter object to its competency, since he will not be permitted to take inconsistent positions."

g. Ford on Evidence, New York, 1935 Edition, published by Matthew Bender & Company, Inc., Volume 4, page 2703, states:

> "Sec. 530. *Waiver*—Parties may waive the rules established by the courts for the admission of evidence. 'Parties by their stipulations may in many ways make the law for any legal proceeding to which they are parties, which not only binds them, but which the courts are bound to enforce. They may stipulate away statutory and even constitutional rights * * * (Matter of New York, Lackawanna, etc., R. R. Co., 98 N. Y. 447; * * *)'"

h. See also, *New York Elevated Railroad Company v. Fifth National Bank,* 135 U. S. 432;

Wallerich v. Smith et al., 66 N. W. 184, 97 Iowa 308;

State v. Gee Jon, 211 Pac. 676, at page 679; 30 A.L.R. 1443, at page 1447;

Hinkle v. James Smith & Son, 65 S. E. 427, 133 Ga. 255.

4. Had the appellant's counsel not consented to the Court considering this text, extracts therefrom would not have been used by appellee's counsel for any purpose.

5. Doctor Romig's opinion as to the prognosis of this injury was not based upon Wechsler's text alone but "based upon my diagnosis and study of the text you have mentioned, and my experience as a surgeon and physician" (T.R. 45, lines 9-12, inc.). To the same effect, "My prognosis in addition to being based upon my diagnosis, is in some measure based upon my recent study of Wechsler's Textbook of Neurology" (T.R. 44, lines 24-27, inc.). From a reading of the entire testimony of Doctor Romig, as distinguished from statements lifted from the context for a devious purpose, it is apparent that Doctor Romig merely used some of Wechsler's language to express his own opinion. The evidence of the other doctors, moreover, in itself supports the judgment of the trial Court. (See Appellee's Statement of Evidence.)

6. Assuming that the medical text was improperly referred to, despite the consent of appellant, the trial Court was not unduly influenced thereby, and other matter in the case strongly supports the trial Court's decision. This is particularly true in a civil case, especially one tried by a Court alone without jury.

SECOND POINT RAISED.

THE ADMISSION OF THE TESTIMONY OF THE WITNESS DAUGHERTY AS TO HIS OPINION AS TO APPELLEE'S ABILITY TO OBTAIN LIFE INSURANCE IN THE FUTURE WAS NOT PREJUDICIAL ERROR.

7. Appellant in his brief states that "undoubtedly the Court relied on this testimony in making his de-

cision herein as he specifically refers to the life insurance data in his findings (T.R. 10)." This is an erroneous conclusion as the trial Court in his findings refer only to the Mortality Tables or Exhibit 128 (T.R. 9, 10). There is nothing in the record to indicate that the trial Court even considered this testimony.

8. The cases cited by appellant to support the contention that Daugherty's testimony was inadmissible are all cases where the issue was that of the materiality of a misrepresentation contained in an insurance policy or whether an undisclosed fact was material to an insurance risk. All cases cited by appellant are found in 135 A.L.R. 411 in an annotation entitled "Opinion or expert testimony as to materiality of misrepresentation in application for insurance or as to increase of risk or as to practice or usage of insurance companies regarding acceptance or rejection of certain class of risk."

In *Penn. Mut. Life Ins. Co. v. Mechanics' Savings Bank & Trust Co.,* 72 Fed. 413, cited by appellant, Taft J. stated at page 423:

> "The question of evidence thus presented has been before the courts of England and America in many different phases and the decisions present a bewildering conflict of authority."

Taft adds later, at page 428 as the reason for the rule of exclusion, adopted by one line of decisions, the following:

> "* * * it is difficult to see why an insurance examiner should be permitted to influence the

> jury by giving his sworn opinion *on the very issue* which they are assembled to try, and of which they are presumed to have the same opportunities upon which to found a reliable judgment as he." (Italics supplied.)

Appellee submits that since there is a conflict of reputable authority on the question of admissibility of this evidence where the very issue of the case is involved, that no error was committed in accepting such testimony in this case when it did not affect the issues of this case in any way. Appellant stated Daugherty's testimony was "immaterial" in his objection (T.R. 136).

9. Assuming that Daugherty's testimony was inadmissible, it did not and could not have affected the trial Court's decision. The ability or inability to obtain life insurance because of appellee's injuries would not affect the measure of damages; assuming that it could have, there was still abundant evidence to support the damages awarded.

THIRD POINT RAISED.

THE DAMAGES AWARDED WERE NOT EXCESSIVE.

10. *McDonald v. Standard Gas Engine Co., et al.*, 47 P. (2d) 777, District Court of Appeal, First District, Div. 2, California, 1935; rehearing denied by Cal. Sup. Ct. in 1935, is a case strikingly similar to this case. In the *McDonald* case, a verdict for $100,000.00 was awarded plaintiff for personal injuries sus-

tained when a pulley in an iron factory exploded and fragments therefrom struck plaintiff. The injuries were strikingly similar. We quote at length from the opinion:

> "It is earnestly asserted that the verdict was excessive and for that reason the judgment should be reversed. The verdict was in the sum of $100,000, and it will be conceded at once that that is a very high figure. It is equally clear that the injuries suffered were appalling. After the accident the plaintiff was taken at once to Highland Hospital. Dr. Schwartz, the assistant superintendent, was at the hospital when the patient arrived. He testified: 'The patient arrived deeply unconscious and in a state of profound shock. There was a large area of the scalp torn loose, appeared to be about half scalped, over the left frontal region. A large strip of the scalp cap had been torn away, leaving an opening about the size of a saucer. The dura mater, which is the covering of the brain, had been torn in two, thus exposing the brain. Large quantities of macerated brain tissue were exuding from the hole in the skull cap. His clothes were spattered with bits of brain tissue. I noticed on his left shoulder a big gob about the size of an English walnut. The wound was contaminated. It looked like streaks of grease or oil, bits of pulverized bone. * * * That was a compound comminuted fracture of the skull, and brain was exuding, and brain was spattered all over the outside.' Dr. Allen, chief of staff of the hospital on brain injuries, gave similar testimony, but stated that the hole broken in the skull cap measured two and one-half by two inches. Continuing, Dr. Al-

len stated: 'He also had a contused wound on the left elbow which indicated a fracture of that elbow. * * * There was a large cut on his neck, his throat was cut. He had a lesion which made the left eye appear crossed. * * * There are several nerves in the brain, twelve on each side, that supply various structures about the head and the muscles that make our eyes move from side to side or up and down and are controlled by some of those nerves. One in particular called the sixth cranial nerve is the one that makes our eyes turn to the left and to the right. This particular nerve had been injured and he could not move his eye. There was one other nerve injured in his face, the seventh nerve. That nerve supplies the muscles of expression on the side of the face so that he was unable to wrinkle the face in the normal manner. There was another result much more serious, and that is what is known as aphasia. He was unable for many weeks after this accident to talk coherently, or to even make known his wishes. He understood our language but was unable for at least two or three weeks to express himself and that was due to a particular lesion of the left side of the brain. That in my opinion was the most serious injury sustained.' He received apparently the best medical attention and hospitalization. While yet unconscious the patient was taken to the operating room, the wound in the skull was thoroughly cleansed, the dura mater was sewed up, the scalp was drawn over it and sewed up. In this form the skull wound was healed. The cranial nerves were in part grafted, and much relief was given to the patient enabling him to more nearly con-

trol his left eye. The wound on the throat was satisfactorily treated and so was the broken elbow. At the time of the trial the patient had regained the power to talk, not fluently, but there had been some restoration of that function. The sixth cranial nerve could not be restored. The function of the nerve controlling facial expression appeared to be fully restored. The hole that had been broken in the skull remained, but the dura mater and the scalp were in place over the depression. The injury to the left eye had become less, but at the time of the trial there was some loss of vision in that eye. Testifying as to the then condition of the left eye, Dr. O'Connor said: 'He can see singly and not double and see straight ahead. Before we did the first operation there was motion upward about fifteen degrees from the straight position. We gained about ten degrees on that. If he is left in his present condition he can never turn his eye upward any more than at present. I have done all for him I expect to do.' Dr. Fleming testified: 'I examined Mr. McDonald at our office yesterday afternoon. * * * He has a defect in the left frontal temple region that measures five centimeters by six. When you palpate this depression you can feel the brain substance underneath and when he coughs there is a very marked protrusion of the brain substance and along the frontal region there is a tenderness. He has a scar up there over his eye and ear. That resulted from the removal of the bone at the time of his injury. Defect is referable to the left eye. The left pupil is smaller than the right, and the left pupil does not react as well as the

right. He cannot look to the left nor apparently upward, because the injury to the sixth nerve is so great and also the third. When he looks far to the left he sees double and if he looks upward he does the same. He had a very definite injury at the side of his neck, a lacerated wound that has caused a scar. He has some difficulty in opening his mouth fully because of the temporal muscle that has become adhered to the bone. At first he was unable to open his mouth at all but because of constant exercises he is now able to open it about two-thirds of normal. That is due to a restricted muscle on the left side of the head. He has a scar on the left elbow and limitation of movement of the left elbow and left arm and hand, a trifle weaker than the right.'

"Speaking of the future treatment of the case, Dr. Fleming testified: 'The contemplated operation is one to fill in a defect in the left frontal region. He has a depression there and from a cosmetic point of view it would be important to correct that, but the more important thing is to cut down the adhesions. The thing to do will be to graft down a bone in there and give protection. That operation will be to incise the scar at the scalp wound and turn back healthy scalp and muscle and freshen up the edges of the bone, cut down the adhesions between the brain itself and the dura, and then take several pieces of bone from his leg and fit those over the defect in such a way that it will fill the defect in and put a layer of bone between the brain and the scalp to give him further protection from injury. The pieces of bone will be taken from the anterior portion of the tibia. The particular place

to cover is about two and one-half inches long.' Dr. Allen testified that in his opinion the patient will never be fit to perform the functions of an officer in the navy. 'Although he has made a very good recovery to date, I feel there may be further deterioration of his mental powers and also the possibility of epilepsy comes up. * * * I did not know the patient prior to the time of his accident but I would feel that his mental concentration is not as good as it was.'

"At the time of the accident the plaintiff was an officer in the navy, he was injured in line of duty and his medical bills were paid by the navy. He was receiving $273 per month, but in the following June his class was promoted, and at the time of the trial he was receiving $330 per month. His life expectancy is 32½ years. Instead of being promoted he is to be retired. When he is discharged from the hospital then his pay will be only $100 per month. Based on the pay of a senior grade lieutenant his actual financial loss is $89,700 without giving any consideration to the probability of further promotions with increasing base pay and allowances, nor to the fact that an officer's pay is automatically increased 5 per cent of the base pay for each three years of service up to 30 years.

"In support of their attack on the verdict, the defendants argue that the future damages are those only which 'are reasonably certain to result.' Silvester v. Scanlan, 136 Cal. App. 107, 111, 28 P (2d) 97. They then quote the experts. Dr. Fleming testified as to the future. Among other things, he said: 'Although he (the plaintiff) has made a very good recovery to date, I *feel* there

may be further deterioration of his mental powers and also the *possibility* of epilepsy comes up. I would think there is some mental deterioration that cannot be repaired. I did not know the patient prior to the time of his accident, but I would *feel* that his mental concentration is not as good as it was. Epilepsy is *likely* to follow a condition of this kind *quite often.* A man who has had a loss of brain substance and there has been damage to the brain caused by adhesions, it develops definite pressure on the brain and we know that oftentimes epilepsy follows.' The defendants emphasize the words which we have italicized and then they argue: '* * * No doctor essayed to testify that he would have epilepsy or any definite mental impairment, the only thing at all of this character being the above-mentioned speculation that he might.' But none of the evidence quoted was objected to. No ruling was asked of or made by the trial court. Defendants introduced no evidence rebutting the above excerpts. Under these circumstances we think the provisions of section 3283 of the Civil Code were complied with."

11. In *Marland Refining Co. v. McClung,* 226 Pac. 312; 102 Okl. 56, the Supreme Court of Oklahoma, decided in 1924, another very similar case involving a skull fracture, apparently without actual injury to the brain itself and an injury involving no removal of brain substance, where the Court awarded the plaintiff the sum of $25,000.00 and where on appeal it was argued that the verdict was excessive, and the Appellate Court upheld the verdict saying:

"It is contended that the verdict of the jury is excessive. The plaintiff was a young man 26 years of age at the time of the accident and employed by the Larrance Tank Corporation as its superintendent, earning $43.20 per week. He had been following his occupation of sheet metal worker for 8 years, having served 3 years as an apprentice and having worked continuously at his trade, with the exception of about 10 months' time, when he was in the army. It is undisputed the plaintiff received a 'basal fracture', that is, a fracture of the skull beginning at the base of the skull to the rear and left extending to the top of the skull. There is evidence in the record that the injury is permanent; that defendant in error is practically incapacitated for work of any kind. There is evidence that the injury such as received by the defendant may result in death, or epilepsy or insanity. There is evidence that the plaintiff cannot look up without wanting to fall, or close his eyes without wanting to fall. There is evidence that plaintiff suffers pain from headache and dizziness, and this continued every day up to the time of the trial. The injury occurred upon Thursday, and the plaintiff was unconscious until Sunday. That he bled from his ears and his hearing was affected. As to whether the injury to his ears is permanent or not, there is evidence that his hearing and eyesight are both practically normal. There is evidence he cannot read more than 30 minutes at a time without suffering pain. There is evidence that since the accident the plaintiff is apathetic and does not always recognize his friends, but appears sullen and unlike his former self.

"The case was tried about 10 months after the injury, and the plaintiff's condition was not improving, except as to his hearing, and regarding his eyes. The parties both cite numerous cases regarding the amount of the verdict. This court has discussed the question of excessive verdicts in numerous cases, to-wit: Slick Oil Co. v. Coffey, 72 Okl. ....., 177 Pac. 915; City of Sapulpa v. Deason, 81 Okl. 51, 196 Pac. 544; C.R.I. & P. Ry. Co. v. Fontron Loan & Trust Co., 89 Okl. 87, 214 Pac. 172; Okl. Prod. & Ref. Corporation of America v. Freeman, 88 Okl. 166, 212 Pac. 742; Sapulpa Electrical Interurban Co. v. Broome (Okl. Sup.) 219 Pac. 289.

"The verdict in the instant case is very substantial. The defendant concedes that plaintiff has received a very severe injury to the extent of suggesting that the verdict should not exceed the sum of $15,000. The defendant concedes that plaintiff is no doubt disqualified from doing any scaffolding work and possibly cannot do any work that involves severe jarring or severe physical exertion. It is conceded that plaintiff had done nothing from the date of the accident to the time of the trial that required any physical exertion, but merely assisted around the house. It is conceded, and one of the doctors, at least, testified, that the vertigo or dizziness is probably permanent. The defendant, however, suggests that there are avenues of work for which the plaintiff will not be disqualified. It is true that a person might receive many injuries that would disqualify him from doing one class of work that would not disqualify him from doing another. Here we have

a person who has received a fractured skull, and the brain is impaired and affected to some extent, and there is evidence that this injury is permanent. The plaintiff testified when he lies down and gets up that he is dizzy, and everything appears to be turning around, and when he reads 30 minutes his eyes hurt, and if he walks a little too far his head hurts. When these facts are considered, with the other facts heretofore stated, we think the permanency of the injury and the question of whether there is any vocation in life that plaintiff may follow are proper questions for the jury. The evidence in the record will support a finding that the plaintiff will be a constant sufferer the remaining days of his life, and the injury is such that he is and will be deprived of earning a livelihood, and the injury is of such a nature that he is liable to be afflicted with epilepsy or insanity. When these facts are considered in connection with the law as announced in the prior decisions of this court heretofore cited, we do not think it can be said that the verdict is so excessive as to justify this court in disturbing the same."

12. *Miller et al. v. Tennis,* 282 Pac. 345, 140 Okl. 185, the Supreme Court of Oklahoma, decided in 1929, was a case of compound skull fracture of the frontal portion, where a verdict of $30,000.00 was held not excessive, the court referring to *Marland Refining Co. v. McClung, supra.* Plaintiff was a minor with an expectancy of 44.85 years and was capable of earning $100.00 per month.

13. See also *Figlar v. Gordon,* 53 A. (2d) 645, 133 Conn. 577, decided in 1947, where a $30,000.00 verdict was held not excessive and "her primary injuries consisted of a compound comminuted depressed fracture of the skull with laceration of the brain and destruction of much brain tissue and a badly comminuted fracture of the right tibia and fibula". The Court in that case further stating, at page 648:

> "A year after the accident she still walked with a limp and at the time of trial had a 10 per cent loss of use of her lower leg. She still had a soft spot where the portion of skull was removed which may require an operation later for the insertion of a plate. Without this, danger of harm from a blow in that area will continue. At the time of trial she had been unable to resume her work and was still nervous, and irritable and suffered from disturbed sleep. The danger that epilepsy may develop during the next 10 to 15 years cannot be ruled out. While the evidence would not justify an award of damages based upon the occurrence of epilepsy in the future because it went no further than to deal with this as a possible result, the danger that it might ensue was a present fact and the jury were entitled to take into consideration anxiety resulting therefrom. Orlo v. Connecticut Co., supra, 128 Conn. at page 236, 21 A. 2d 402. In addition to the intense suffering already endured she will continue to have pain. Her loss of wages to the time of trial totalled $2,624 and her expenses for medical treatment amounted to $1,759.50, establishing special damages of $4,383.50."

14. In *Elder v. Chicago R. J. & P. Ry. Co.,* 204 N. W. 557, Supreme Court of Minnesota, 1925, affirmed by the United States Supreme Court, in 270 U. S. 611, the Court stated, at page 558:

> "The defendant insists that the verdict, which was for $29,940, is excessive. Plaintiff was 38 years old. He earned from $240 to $250 per month. He was badly burned, some ribs were broken, he suffered a concussion of the brain and was unconscious for a few days. There was an injury to the spinal cord. There is testimony that he will never be able to do manual work again, at least heavy work. He is deformed and still suffers".
>
> "The verdict is not excessive. Injuries are usually not quite alike nor are other elements entering into a proper award of damages, such as age, life expectancy, earning capacity, pain, and suffering, from the combination of which the award must be estimated in a sensible way, just the same. Damages awarded and sustained in other cases are of value for illustration but usually not at all controlling. * * *"

15. *The present marked increase in cost of living and the small purchasing power of money must be considered in determining whether the judgment was excessive or not.*

Annotation 46 A.L.R. 1230. At page 1234, *Hurst v. Chicago B. & Q. R. Co.* (1920), 280 Mo. 566, 10 A.L.R. 174, 219 S. W. 566, is cited as well stating the doctrine as follows:

"Compensation means compensation in value. It will not do to say that the same amount of money affords the same compensation when money is cheap as when money is dear. The value of money lies not in what it is, but in what it will buy. So follows that if $10,000 were fair compensation in value for such injuries as are here involved twenty years ago, when money was dear and its purchasing power was great, a larger sum will now be required when money is cheap and its purchasing power is small. How much larger will depend upon the difference in value (that is, in purchasing power) of money now and then. That money today has much less purchasing power than it had twenty, or even ten, years ago, admits of no dispute, and we are not justified in disclaiming judicial knowledge of a world wide condition seen and known of all men everywhere. If that be true, then if we today allow the same amounts in money that we allowed in like instances ten or twenty years ago, we are following our decisions of that day in letter, but departing from them in spirit. We are warned, upon excellent authority, that 'the letter killeth, but the spirit giveth life'. 2 Corinthians, iii, 6."

Also *Sherrill v. Olympic Ice Cream Co.* (1925), 135 Wash. 99, 237 Pac. 14 states:

"The old cases are only of relative value, because economical conditions today are not the same as they were ten or fifteen or more years ago".

Cases herein cited by appellee, supra, involving very similar injuries, in support of his contention that the judgment is not excessive, were decided during years as follows:

McDonald v. Standard Engine Co.	$100,000.00—1935
Marland Refining Co. v. McClung	$ 25,000.00—1924
Miller v. Tennis	$ 30,000.00—1929
Figler v. Gordon	$ 30,000.00—1947
Elder v. Chicago Ry. Co.	$ 29,940.00—1925

16. *The trial Court's decision will be upheld unless clearly and outrageously excessive.*

> "Upon appeal the decision of the trial court and jury on the subject cannot be set aside unless the verdict is 'so plainly and outrageously excessive as to suggest, at first blush, passion and prejudice or corruption on the part of the jury' ". Mudrick v. Market Street Ry. Co., 81 P. 2d 950 (quotation from page 956).

17. *Mere provocation cannot be shown in mitigation of compensatory damages.*

Horky v. Schroll, 26 N. W. (2d) 396; in that case, an action for assault and battery and for the recovery of damages, the Court at page 398 reviewed the authorities on this subject and concluded at page 399:

> "We conclude that the trial court properly refused to permit defendants to plead and prove provocation in mitigation of compensatory damages, as proposed by them".

The entire record of this proceeding, both civil and criminal, shows little or no evidence of provocation on the part of appellee, but assuming that it did, it would not affect the question of damages. The matter of appellant's point to the effect that there is considerable evidence in the record that appellee provoked the altercation and voluntarily entered into a fist fight

with appellant is adequately considered in the brief for the appellee in Case No. 11545 filed in this Court by the United States Attorney, Anchorage, Alaska, at pages 1, 2, 7, 8 and 9 thereof. The jury in the criminal case did not so conclude, nor did the trial Court in this civil proceedings. Furthermore, we do not believe that this matter has been properly submitted to this Court as error.

CONCLUSION.

In summarizing, appellee submits:

1. From the foregoing it appears that none of the points raised by appellant, or indeed all of them together, constitute error in this trial without jury. This is a clear case of an aggravated and unjustified assault culminating in extreme and permanent injuries to appellee.

2. The record in this case adequately and entirely supports the trial Court's findings and judgment for the reasons set forth in the foregoing brief for appellee.

We request that the judgment be affirmed.

Dated at Anchorage, Alaska, this 21st day of September, 1948.

Respectfully submitted,

HELLENTHAL & HELLENTHAL,

By JOHN S. HELLENTHAL,

Of Attorneys for Appellee.

Certificate of Counsel

I, John S. Hellenthal, of Attorneys for Appellee, hereby certify that I have prepared the original brief for appellee in this cause and that the above and foregoing copy of said brief for appellee is a true, full and correct copy of the original brief for appellee, as prepared by me.

Dated at Anchorage, Alaska, this 21st day of September, 1948.

John S. Hellenthal,
Of Attorneys for Appellee.

No. 11,807

IN THE

United States Court of Appeals

For the Ninth Circuit

Z. E. EAGLESTON,
Appellant,

vs.

FRANK ROWLEY,
Appellee.

APPELLANT'S CLOSING BRIEF.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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No. 11,807

IN THE

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For the Ninth Circuit

Z. E. EAGLESTON,
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Appellee.

APPELLANT'S CLOSING BRIEF.

FIRST POINT RAISED.

1. **APPELLANT EXPRESSLY OBJECTED TO THE ADMISSION INTO EVIDENCE OF THE MEDICAL TEXTBOOKS AND PRESERVED THIS OBJECTION IN HIS EXCEPTIONS.**

When counsel for appellee offered the medical textbooks in evidence, counsel for appellant stated:

> "We object to them as exhibits, your Honor, because, as I remember the rule, textbooks are inadmissible. But we have no objection to the Court consulting any work that he desires—researches on this case. As exhibits we object to them." (Appellee's brief, p. 12.)

Appellee thereupon withdrew his offer that the books be received as evidence, and stated:

> "I merely offer them for the consideration of the doctor and the Court." (Appellee's brief, p. 13.)

The following then transpired:

> "Court. Very well, I understand the proffer is withdrawn and that counsel for the defense have no objection to the Court considering these texts.
>
> Mr. Grigsby. Nor any other texts." (Appellee's brief, p. 13.)

Appellee's statement in his brief (p. 13) that no mention is made in the exceptions and assignments of errors of the trial Court's error in considering the medical textbook is not borne out by the record.

In appellant's exceptions (T.R. 12) it is expressly stated:

> "Defendant excepts to Finding of Fact No. III * * * on the ground that such finding was based partially upon improper evidence as detailed in paragraph IV, of said Findings of Fact."

Paragraph IV of the findings details Wechsler's Textbook as one of the elements of evidence relied on by the trial Court in fixing the damages.

Again, in paragraph IV of appellant's assignment of errors, the trial Court's judgment is excepted to on the ground that the judgment is:

> "* * * not justified by the evidence introduced in the trial of said cause." (T.R. 17.)

It is well settled that once an objection has been made to a certain class of evidence it need not be repeated if evidence of the same class is again offered.

53 *Am. Jur.* 131.

"If there has been a sufficient and specific objection to testimony, it is not necessary to repeat the objection in the event that testimony of the same character is again offered."

Jones on Evidence, Civil Cases, 4th Ed. 1938, Vol. 3, p. 1663.

To the same effect:

Grand Trunk Pac. Ry. Co. v. Tollard (C.C.A. 8th), 286 Fed. 676, 678;

Salt Lake City v. Smith, et al. (C.C.A. 8th), 104 Fed. 457, 470;

Sharon v. Sharon, 79 Cal. 633, 674, 22 Pac. 26;

Tucker v. Reil, 51 Ariz. 357, 77 Pac. (2d) 203, 208;

North American Acc. Ins. Co. v. Caskey's Adm'r, 218 Ky. 750, 756, 292 S.W. 297, 299;

Bennett v. Gusdorf, 101 Mont. 39, 53 Pac. (2d) 91, 95;

Cromeenes v. San Pedro, L.A. & S.L.R. Co., 37 Utah 475, 109 Pac. 10, 14;

Maxcy v. Peavey, 178 Wis. 401, 190 N.W. 84, 86.

Appellant specifically objected to the admission of Wechsler's Textbook in evidence. The offer having thereupon been withdrawn by appellee, it was unnecessary thereafter to renew the objection when Dr. Romig improperly quoted from this textbook (T.R. 46-47) and summarized portions thereof (T.R. 44, 48, 49) in basing his prognosis on that textbook (T.R. 44).

> "Certainly, if the book itself cannot be read in evidence to the jury, the witness cannot be permitted to give extracts from it as evidence, depending upon his memory for their correctness."
>
> *Boyle v. State,* 57 Wis. 472, 479, 15 N.W. 827.

A witness should not be permitted to read as evidence matters that have not been admitted into evidence.

> *Ward v. Liverpool Salt & Coal Co.,* 79 W. Va. 371, 92 S.E. 92, 97.

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2. APPELLANT DID NOT CONSENT TO THE USE OF THE TEXTBOOK IN EVIDENCE AS THE BASIS OF THE TRIAL COURT'S FINDINGS.

In all the authorities cited by appellee in his discussion of the first point raised in his brief (pp. 14-16), the questioned material was actually admitted into evidence. In the case at bar, the textbooks were offered in evidence, but the offer was withdrawn upon objection by appellant. Consequently they were never received in evidence.

In appellee's brief (p. 11) he concedes that pages 534 to 540, inclusive, of Wechsler's were never admitted in evidence. It is thus apparent that the authorities cited by appellee and the reasoning therein have no applicability to the present case.

Despite the fact that it was never in evidence, appellee argues (p. 13) that the trial Court was entitled to "consider" Wechsler's text in arriving at his decision.

Although pages 534 to 540, inclusive, of Wechsler's Textbook were admittedly never in evidence, the trial Court, in finding No. IV (T.R. 9-10) unequivocally stated:

> "* * * that in the fixing of said amount of thirty-seven thousand dollars, pages 534 to 540, inclusive, sub-entitled 'Fracture of the Skull,' of 'A Textbook of Clinical Neurology, with an Introduction on the History of Neurology,' by Israel S. Wechsler, M.D., Fifth Edition, Revised, 1944, W. B. Saunders Company, were considered."

And in his certificate to the counter-praecipe, wherein these pages are made part of the record in this case (T.R. 171-182) the trial Court stated:

> "The foregoing seven and one-third pages of typewritten matter have been copied from pages 534 to 540, inclusive, of 'A Textbook on Clinical Neurology,' etc., by Israel S. Wechsler, M.D., Fifth Edition, Revised, published by W. B. Saunders Company, Philadelphia and London, 1944, *and are a true copy of the original text of said work considered in arriving at the decision embodied in the Judgment* in the case of Frank Rowley v. Z. E. Eagleston, cause No. A-4239 of the District Court for the Territory of Alaska, Third Division. *No other part of said book was considered.* The foregoing is the material referred to in the latter part of Paragraph IV of the Findings of Fact in said cause signed and entered on Dec. 27, 1946." (Italics ours.)

It is well established that a trial Court cannot base its findings upon matters not in evidence.

> "A judge assuming to determine questions of law and fact in a law action where a jury is waived must arrive at his conclusions regarding facts at issue from matters presented on the trial and not from matters which have come to his knowledge in some other manner."
>
> *New York Life Ins. Co. v. Tedder,* 113 Fla. 649, 153 So. 145, 148.

To the same effect:

> *Cassels v. Ideal Farms Drainage Dist.,* 156 Fla. 152, 23 So. (2d) 247, 249;
>
> *State v. Smith* (Mo.), 134 S.W. (2d) 1061;
>
> *O'Rourke v. Cleary,* 105 Vt. 85, 163 Atl. 583, 584;
>
> *Johnson v. Superior Rapid-Transit Ry. Co.,* 91 Wis. 233, 64 N.W. 753, 754.

A document is not proof of the facts stated therein unless tendered in evidence and admitted for that purpose.

> *Quitman Oil Co. v. McRee,* 18 Ga. App. 128, 88 S.E. 921.

Appellant's statement that he had no objection to the Court "consulting" Wechsler's Text, "or any other texts", did not have the effect of placing these texts *in evidence* so as to form the basis of the Court's findings and judgment.

In the colloquy between Court and counsel concerning the textbooks, counsel for appellant specifically stated:

> "But we have no objection to the Court consulting any work that he desires—researches on this

case. *As exhibits we object to them.*" (Italics ours.) (Appellee's brief, 12.)

In so stating counsel for appellant expressly adhered to his position that these works were inadmissible *as evidence* and merely assented to the prerogative of any Court, sitting without a jury, to have recourse to general works touching on the topic which is the subject matter of the case at bar to assist the Court in logically arriving at a decision, but in no sense to base his decision on the contents of the works thus referred to. The prerogative referred to is an old doctrine in the law and is perhaps best stated in *Wharton's Law of Evidence,* 3rd Ed. (1888), Sec. 665, at pages 650, 651. Concerning such use of scientific treatises, Wharton said:

> "In an argument *to a court* such works may be read, not as establishing facts, * * * but as exhibiting distinct processes of reasoning which the court, from its own knowledge as thus refreshed, is able to pursue. But if offered *to establish facts* capable of proof by witnesses, or to introduce expert authority under the guise of an argument, such books should not be received, *even when addressed to the court;* nor should they under any circumstances be read as part of an argument to the jury." (Italics ours.)

Jones, in his work on Evidence, likewise points out the proper function of scientific texts when used by the Court to aid him in arriving at a decision:

> "When books of science or general literature are thus used during the argument of counsel, they are merely adopted as the argument of counsel. They are used by way of *illustration,* and

cannot be used for the purpose of proving facts." (Italics ours.)

Jones Commentaries on Evidence, Vol. 3 (Horwitz), Sec. 580, p. 749.

It is error for the Court, sitting without a jury, to treat and consider as evidence scientific texts proffered only for purposes of illustration to guide the reasoning of the Court.

Boyle v. State, supra, 479.

The Court may not use his personal observation of matters not in the record, although present at the trial, as evidence upon which to base his findings.

Conyer v. Burckhalter (Tex. Civ. App.), 275 S.W. 606, 613;

Kay v. Cain (C.C.D.C.), 154 Fed. (2d) 305, 306.

In the present record, any information which the Court may have gleaned from Wechsler's Textbook could be used only for the purpose of aiding his reasoning power and to enhance his personal knowledge upon the subject. It is well established, however, that a trial judge may not use this personal knowledge as a basis for his findings, but must adhere strictly to the evidence offered and received in the record.

Tullgren, et al. v. Karger, et al., 173 Wis. 288, 181 N.W. 232, 234;

Utah Nursery Co. v. Marsh, 46 Colo. 211, 103 Pac. 302;

Kovacs v. Szentes, 130 Conn. 229, 33 Atl. (2d) 124, 125;

New York Life Ins. Co. v. Tedder, supra;

Pua v. Hilo Tribune-Herald, 31 Haw. 65;
Skyline Swannanoa v. Nelson County, 186 Va. 878, 44 S.E. (2d) 437, 441.

"Members of a judicial or quasi-judicial body should not, and do not, decide issues on personal knowledge, but only upon the evidence produced before them."
Skyline Swannanoa v. Nelson County, supra.

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3. **THE TRIAL COURT ERRONEOUSLY BASED ITS FINDING IV UPON INADMISSIBLE EVIDENCE, AND SO CO-MINGLED IT WITH OTHER EVIDENCE AS TO VITIATE THE ENTIRE FINDING AND THE JUDGMENT RENDERED THEREON.**

Appellee erroneously argues that inasmuch as there was other evidence in the record (in addition to the objectionable textbook and testimony thereon) the findings of the trial Court and the judgment must stand.

This rule of law, as contended for by appellee, is contained in 3 *Am. Jur., Appeal and Error,* Sec. 940, p. 504, and in 5 *C. J. S., Appeal and Error,* Sec. 1728, p. 997. These authorities correctly hold that in an action tried by a Court without a jury, it will be presumed, *in the absence of indication to the contrary,* that the trial judge, in reaching his findings, disregarded incompetent evidence, erroneously admitted, and based his findings upon properly admitted evidence. This rule, however, is not applicable in the instant case. Here the Court both in his findings and his certificate to the counter-praecipe, specifically states that he based his findings upon the objectionable text material.

As said in 3 *Am. Jur.,* supra,

> "This presumption, however, loses its force when it reasonably appears from an inspection of the record that the incompetent testimony did influence in some degree the action of the trial court in rendering the particular judgment."

And in 5 *C.J.S.,* supra,

> "On the other hand, the admission of incompetent evidence which influences the court in arriving at its decision may be regarded as prejudicial error requiring reversal."

Applying these rules, the Supreme Court of Oregon, in *Menefee v. Blitz* (Ore.), 179 Pac. (2d) 550, 564, stated:

> "In the case at bar it is impossible to presume that the erroneously admitted testimony was not considered when the findings were entered. It affirmatively appears that it was considered, and that it influenced the trial court when the attacked judgment was rendered. We conclude that the first two assignments of error must be sustained."

To the same effect:

> *Southern Surety Co. v. Nalle & Co.* (Tex. Civ. App.), 242 S.W. 197, 202.

The rule, thus stated and applied, as to the affirmative co-mingling of incompetent evidence with other evidence in arriving at a finding may likewise be applied with equal force to the testimony of the witness Daugherty in answer to appellee's argument at pages 17 to 19 of his brief.

THIRD POINT RAISED.

In support of his contention that the damages awarded were not excessive, appellee cites several cases.

In *McDonald v. Standard Gas Engine Co., et al.,* 47 Pac. (2d) 777 (appellee's brief p. 19) and *Marland Refining Co. v. McClung,* 102 Okl. 56, 226 Pac. 312 (appellee's brief, p. 25), the injuries sustained by the plaintiffs are set forth in full in appellee's brief. A cursory comparison of the injuries and resultant disabilities in those cases with those sustained by appellee in the case at bar clearly shows that in the former cases the initial injuries were much more severe; and involved other parts of the body, in addition to the head. The hospital periods were substantially greater, and the prognosis showed far less chance of complete recovery.

In *Miller v. Tennis,* 140 Okl. 185, 282 Pac. 345 (appellee's brief, p. 28), the plaintiff, in addition to the skull fracture mentioned in appellee's brief, had his forehead badly caved in; the eyebrows torn loose at the top and driven directly into the brain; a punctured sinus, and there was testimony that he would constantly suffer the remainder of his life and be deprived of earning a livelihood.

In *Figlar v. Gordon,* 133 Conn. 577, 53 Atl. (2d) 645 (appellee's brief, p. 29), in addition to the skull fracture, plaintiff sustained a badly comminuted fracture of both the right tibia and fibula causing her to walk with a limp a year after the accident, and at the time of the trial she had a ten per cent loss of the

use of her lower limb. After the injury there was grave doubt as to whether she would survive.

Likewise, in *Elder v. Chicago R.J. & P. Ry. Co.,* 204 N.W. 557 (appellee's brief, p. 30), the plaintiff was badly burned in addition to the head injury, and he sustained an injury to the spinal cord and broken ribs. At the time of the trial he was deformed.

The severity of the injuries in the cited cases clearly entitled the plaintiffs therein to substantially more monetary damages than appellee should receive in this case.

As stated in appellant's opening brief, the cases therein cited were decided in periods when the purchasing power of the dollar was comparable to that at the time of the trial in the instant case (appellant's opening brief, p. 63).

Appellant is convinced that an examination of all the cases cited by the parties hereto will lead to the inevitable conclusion that the damages awarded herein were excessive.

Appellant respectfully submits that the judgment should be reversed.

Dated, San Francisco, California,
October 15, 1948.

GEORGE B. GRIGSBY,
GEORGE T. DAVIS,
Attorneys for Appellant.

SOL A. ABRAMS,
ANTHONY E. O'BRIEN,
Of Counsel.

No. 11809

United States
Circuit Court of Appeals
For the Ninth Circuit.

MISSION CORPORATION, a corporation,

Appellant,

vs.

WILLIAM G. SKELLY,

vols. 3 + 4 of Trans bnd separately

Appellee.

Transcript of Record
IN FOUR VOLUMES
VOLUME I
Pages 1 to 258

Upon Appeal from the District Court of the United States for the District of Nevada

Rotary Colorprint, 870 Brannan Street, San Francisco 3-12-48—70

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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DEFENDANT'S EXHIBIT A

Sunray Oil Corporation: Special Meeting of Stockholders December 5, 1947; Notice of Meeting and Proxy Statement.

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PLAINTIFF'S EXHIBIT NO. 1

Mission Corporation: Special Meeting of Stockholders December 6, 1947; Notice of Meeting and Proxy Statement.

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*Page numbering appearing at foot of page of original certified Transcript of Record.

In the United States District Court
for the District of Nevada

No. 669 Civil

WILLIAM G. SKELLY,

Plaintiff,

vs.

MISSION CORPORATION, a Corporation,

Defendant.

ORDER FIXING TIME FOR HEARING APPLICATION FOR TEMPORARY INJUNCTION

Upon the verified complaint of plaintiff heretofore filed herein, and upon motion of the plaintiff,

It Is Ordered, Adjudged and Decreed that the application of plaintiff for temporary injunction in the complaint of plaintiff prayed for be, and the same hereby is, set for hearing before the District Court of the United States in the Courtroom of said Court in the City of Carson, in the State of Nevada, on the 21st day of November, 1947, at 10 o'clock a.m., on that day, or as soon thereafter as counsel can be heard.

It Is Further Ordered, Adjudged and Decreed that the defendant herein show cause, if any it has, before said Court at said time and place, why said temporary injunction should not issue as prayed for in said complaint herein, and that the defendant also show cause at the same time and place why

plaintiff should not have such other and further relief in the premises as may be just and proper.

It Is Further Ordered that, sufficient cause having been shown, a copy of this order may be attached to the summons herein and this order served by serving said copy with said summons.

Dated this 4th day of November, 1947.

/s/ ROGER T. FOLEY,
United States District Judge.

[Endorsed]: Filed Nov. 4, 1947. [25]

[Title of District Court and Cause.]

MOTION TO DISMISS

Comes Now the defendant above named, Mission Corporation, by its undersigned attorneys in the above-entitled action, and separately moves the Court to dismiss the above-entitled action, upon the following several grounds:

1. That this Court has no jurisdiction of the subject matter of the action, in that it does not appear that the amount in controversy is in excess of the jurisdictional amount of Three Thousand Dollars ($3,000), exclusive of interest and costs, and in this connection defendant denies that such jurisdictional amount is involved.

2. That the complaint fails to state a claim upon which relief can be granted.

Said motions and each of them will be made upon the files and papers in said cause, and upon the points and authorities attached hereto.

Dated at Reno, Nevada, this 10th day of November, 1947.

/s/ LESTER D. SUMMERFIELD,
/s/ ROBERT ZIEMER HAWKINS,
/s/ BRYCE RHODES,
Attorneys for Defendant.

NOTICE OF MOTION

To Thatcher, Woodburn & Forman, William Woodburn, William J. Forman, John P. Thatcher and William K. Woodburn, Attorneys for Plaintiff:

Please Take Notice, that the undersigned will bring the above motion on for hearing before this Court in Carson City, Nevada, on Wednesday, November 12, 1947, at 10 o'clock a.m. of that day, or as soon thereafter as counsel can be heard.

LESTER D. SUMMERFIELD,
ROBERT ZIEMER HAWKINS,
BRYCE RHODES,
Attorneys for Defendant.

ORDER SHORTENING TIME

Upon application of counsel for defendant in the above-entitled action, and good cause appearing therefor, It Is Hereby Ordered that the foregoing

Motion be set and heard before the above-entitled Court at Carson City, Nevada, on Wednesday, November 12, 1947, at 10 o'clock a.m.

ROGER T. FOLEY,
United States District Judge.

MEMORANDUM OF AUTHORITIES

Court Without Jurisdiction:

Kvos vs. Associated Press, 81 Law Ed. 183, 299 U. S. 269 (1936);

Paul V. McNutt vs. General Motors, 80 Law Ed. 1135, 298 U. S. 178;

Paul V. McNutt vs. McHenry Chevrolet Co., 80 Law Ed. 1141, 298 U. S. 190;

Clark vs. Paul Gray, 83 Law Ed. 1001, at 1007, 306 U. S. 583;

N. C. L. 1929 Sec. 1640 (as amended statutes of Nevada 1937 at page 17).

Complaint Fails to State a Claim for Relief:

Beechwood Securities Corporation vs. Associated Oil Company C. C. A. 9th Circuit, 104 Fed. (2) 537;

Hubbard vs. Jones & Laughlin Steel Corporation (Pennsylvania District Court), 42 Fed. Supp. 432, at 435;

Adams vs. United States Distributing Corporation, 34 S. E. (2) 244, at 248-249, 28 U. S. C. A. Sec. 384;

Rieder vs. Rogan, 20 Fed. Supp. 307;

Colby vs. Equitable Trust Company of New York, et al., 124 App. Div. 262, 108 N. Y. S. 978 (February 14, 1908.)

(The Following Appears on Page Four of the Original Motion):

Service of the within and foregoing Motion to Dismiss, by copy, admitted this 10th day of November, 1947.

/s/ JOHN P. THATCHER,
Of Counsel for Plaintiff.

[Endorsed]: Filed Nov. 10, 1947. [57]

[Title of District Court and Cause.]

AMENDED COMPLAINT

For cause of action against defendant, plaintiff alleges:

I.

Plaintiff William G. Skelly is a citizen and resident of the State of Oklahoma.

II.

Defendant Mission Corporation is a corporation organized and existing under and by virtue of the laws of the State of Nevada.

III.

The matter in controversy herein exceeds, exclusive of interest and costs, the sum or value of Three Thousand Dollars ($3,000.00).

IV.

At and before the date of the transactions hereinafter set out, plaintiff was, continuously since has been, and now is, [58] the owner and holder of fourteen thousand (14,000) shares of the common capital stock of defendant, of which two thousand (2,000) shares are of record in his name on the books of the defendant and twelve thousand (12,000) shares are beneficially owned by him. That at the date of this action the said fourteen thousand (14,000) shares had a market value of the sum of Seven Hundred and Seven Thousand Dollars ($707,000.00). Plaintiff brings this action to preserve and protect from threatened and pending irreparable injury (1) all of the property and assets of defendant, which have a market value in the sum of Ninety-one million, five hundred five thousand five hundred twenty-five dollars ($91,505,525.00) and a par value of Ten Dollars ($10.00) per share; (2) the stock and investment of plaintiff in defendant corporation; and (3) the stock and investment of all other stockholders of defendant corporation other than Pacific Western Oil Corporation. This action is brought on behalf of plaintiff himself and all other stockholders of defendant corporation, other than Pacific Western Oil Corporation, who are similarly situated and

jointly interested with plaintiff in the protection of their own investment and preservation of the assets of defendant corporation. That unless enjoined defendant will wrongfully and illegally cause said alleged merger agreement to be approved and carried out and the assets of defendant transferred to Sunray Oil Corporation in exchange for shares of said Sunray Oil Corporation to the irreparable injury and damage of defendant corporation and to the investment of stockholders therein other than Pacific Western Oil Corporation. That the injury and damage to the plaintiff herein and to the defendant corporation and the value of the object sought by this action far exceeds the sum or value of Three Thousand Dollars ($3,000.00). That plaintiff on October 18, 1947, entered his objections of record to the alleged merger agreement, [59] and as a director of defendant endeavored, unsuccessfully, to dissuade the majority directors of defendant from wrongfully approving and proceeding to carry out the alleged merger. That further demand upon the directors or officers of defendant corporation to prevent said merger is, as the facts hereinafter alleged show, wholly useless and futile. This action is not a collusive one to confer on a court of the United States jurisdiction of an action of which it would not otherwise have jurisdiction.

V.

Thomas A. J. Dockweiler and George Franklin Getty II are Trustees under that certain Declaration of Trust dated December 31, 1934, wherein

Sarah C. Getty is named as trustor and J. Paul Getty as original trustee; J. Paul Getty is testamentary trustee under the Decree of Partial Distribution of the Estate of Sarah C. Getty, deceased. Said trustees and J. Paul Getty individually are hereinafter referred to as the Getty Interests.

VI.

The Getty Interests are and at all times hereinafter alleged have been the owners and holders of not less than one million, one hundred sixty-nine thousand, four hundred forty-nine (1,169,449) shares of Pacific Western Oil Corporation, a Delaware corporation, which has issued and outstanding a total of one million, three hundred seventy-one thousand, seven hundred thirty (1,371,730) shares of common capital stock. By virtue of such stock ownership, the Getty Interests have and exercise actual control of Pacific Western Oil Corporation.

VII.

Pacific Western Oil Corporation is and at all times hereinafter alleged has been the owner and holder of not less than six hundred forty-one thousand, eight hundred eight (641,808) shares of defendant, which has issued and outstanding [60] a total of one million, three hundred seventy-four thousand, one hundred forty-five (1,374,145) shares of capital stock. The remaining shares of the capital stock of defendant are owned by more than thirty thousand (30,000) different shareholders other than Pacific Western Oil Corporation. By

virtue of its ownership of stock and proxies obtained from other shareholders by defendant's management, Pacific Western Oil Corporation has for many years last past and now exercises actual control of defendant.

VIII.

The Getty Interests decided to obtain cash for their stock in Pacific Western Oil Corporation and their control of Pacific Western and the defendant herein, and on or about the 4th day of October, 1947, entered into a written agreement with Sunray Oil Corporation, a Delaware corporation, for the sale thereof upon certain terms and conditions, a copy of which is attached hereto as "Exhibit A" and made a part hereof. On said date the book value of Pacific Western Oil Corporation stock was approximately twenty-one dollars ($21.00) per share and its market value (said stock is listed on the N. Y. Stock Exchange) was Fifty-two Dollars ($52.00) per share. Under "Exhibit A" attached hereto, the cash price to be paid by Sunray to the Getty Interests is Sixty-eight Dollars ($68.00) per share, or a total of Seventy-nine Million, Five Hundred Twenty-two Thousand, Five Hundred Thirty-two Dollars ($79,522,532.00), but on said date the book value of said stock was approximately Twenty-four Million, Five Hundred Fifty-eight Thousand, Four Hundred Twenty-nine Dollars ($24,558,429.00) and its market value was only Sixty Million, Eight Hundred Eleven Thousand, Three Hundred Forty-eight [61] Dollars ($60,811,348.00). "Exhibit A"

provides that sale is to be made and the purchase money paid immediately prior to a merger of Sunray Oil Corporation, Pacific Western Oil Corporation, Mission Corporation and Skelly Oil Company (of the capital stock of which Mission owns approximately fifty-nine per cent (59%), becoming effective. However, Skelly Oil Company did not become a party to the merger plan, and it went forward as a plan to merge the other three corporations.

IX.

An agreement to merge Pacific Western Oil Corporation and defendant into Sunray Oil Corporation was prepared, as plaintiff is informed and believes and therefore alleges the fact to be, by Sunray Oil Corporation and Eastman, Dillon & Company (an investment banking firm with offices in New York City), and the Getty Interests. A copy of said agreement is hereto attached, marked "Exhibit B" and made a part hereof. Said agreement does not include or mention any of the terms or provisions of the contract between the Getty Interests and Sunray Oil Corporation, "Exhibit A" hereto, but is conditioned on Sunray acquiring and becoming the owner of the Pacific Western stock covered by "Exhibit A" prior to or simultaneously with the effective date of the merger.

X.

On October 18, 1947, at a special meeting, defendant's Board of Directors by a majority vote, directors Skelly and Hyden voting "No," approved

said merger agreement, "Exhibit B" hereto, and ordered the calling of a special meeting of defendant's stockholders, to be held on the 6th day of December, 1947, at ten o'clock a.m., at the principal office of defendant, No. 153 North Virginia Street, Reno, Nevada, to consider and vote [62] upon the adoption of said merger agreement. That at said meeting, unless the holding thereof be prevented by this Court, the Getty Interests, through their control of defendant as aforesaid, will cause said agreement to be adopted and carried out. The agreement has been executed by a majority of defendant's directors.

XI.

Defendant owns one million, three hundred forty-five thousand, five hundred ninety-three (1,345,-593) shares of the capital stock of Tide Water Associated Oil Company. Plaintiff is informed and believes, and therefore alleges the fact to be, that on the effective date of the Agreement of Merger said stock is to be sold by Sunray to Tide Water Associated Oil Company at a price of Twenty-five Dollars ($25.00) per share, or a total price of Thirty-three Million, Six Hundred Thirty-nine Thousand, Eight Hundred Twenty-five Dollars ($33,639,825.00). That said Tide Water Associated Oil Company stock owned by defendant corporation was, at the date of this action, of the market value of the sum of Thirty-one Million, Four Hundred Fifty-three Thousand, Two Hundred Thirty-six Dollars and Seventeen Cents ($31,453,236.17). Said

sale will also include five hundred seventy-seven thousand, eight hundred fifty-four ($577,854) shares of Tide Water stock owned by Pacific Western Oil Corporation. The proceeds of said sale are to be applied on payment for Pacific Western Oil Corporation stock to be purchased as aforesaid. Plaintiff does not have a copy of the agreement for the sale of said Tide Water stock. Neither its existence nor the intention to make said sale is disclosed by, nor are its terms included in, said merger agreement, "Exhibit B" hereto. [63]

XII.

At said Directors' meeting of October 18, 1947, and prior to a consideration by said Board of the proposed merger agreement, plaintiff was removed as President of defendant and David T. Staples was elected in his stead. Prior to said meeting, the Getty Interests, acting through Fero Williams, suggested to Arch Hyden that he resign as one of Defendant's directors, but he refused so to do. Immediately prior to said meeting, B. I. Graves resigned as a director and at said meeting David T. Staples was elected to succeed him.

The action of defendant's Board of Directors on October 18, 1947, in voting in favor of and the signing of the said merger agreement by a majority of the Board of Directors were and are nullities because effected and done by the vote of defendant's directors, David T. Staples, Fero Williams, Emil Kluth and Arthur M. Boal. Of these, Staples is President of defendant and the President and

a director of Pacific Western Oil Corporation; Williams is a director and Assistant Secretary and Treasurer of Pacific Western Oil Corporation, and Kluth is Vice-President of Pacific Western Oil Corporation. All of them and Thomas A. J. Dockweiler, a director of defendant, were elected to their positions by Pacific Western Oil Corporation at the instance and direction of the Getty Interests. Thomas A. J. Dockweiler did not vote. There is a direct conflict of interest between the stockholders of this defendant in making any merger agreement, including "Exhibit B" hereto, and there is a direct conflict of interest between the Getty Interests and all stockholders of defendant other than Pacific Western Oil Corporation by virtue of "Exhibit A" hereto. The said Staples, Dockweiler, Williams, Kluth and Boal represent the [64] Getty Interests and were and are disqualified from representing defendant and its stockholders other than Pacific Western in each and all of the matters and transactions hereinbefore set out.

XIII.

Prior to the 18th day of October, 1947, there had not been presented to defendant's Board of Directors any matter pertaining to the merger of said three companies, nor had any negotiations concerning it been conducted with W. G. Skelly, defendant's then President and chief executive officer. At said meeting there was presented to the Board "Exhibit B" hereto in final form. The

Board of Directors, acting by and through the directors controlled by and representing the Getty interests as aforesaid, did not have and refused to procure an appraisal of the value of the assets of the corporations proposed to be merged, any information as to whether or not the books of the several companies were kept on the same or comparable bases, or other essential facts or to delay the matter for forty-eight (48) hours to procure the considered opinion of counsel. At said meeting two resolutions, copies of which are attached as "Exhibits C and D" and made a part hereof, were proposed by W. G. Skelly, seconded by Arch Hyden, and rejected by a majority of the Board which represented the Getty Interests. Plaintiff alleges that the action of said Board in approving said merger agreement, "Exhibit B" and calling said stockholders' meeting was summary and arbitrary and was and is a nullity. Plaintiff is informed and believes, and therefore alleges the fact to be, that for tax reasons the Getty Interests demand that the sale of their stock be closed and the money paid them before the end of the year 1947, which [65] cannot be done if time is taken to consider and investigate the proposed merger and determine the relative values of the assets of the constituent corporations.

XIV.

That said purported merger agreement was and is in reckless disregard of the rights of all stock-

holders of defendant other than Pacific Western Oil Corporation, and is so grossly unfair to them as to be fraudulent. That in particular:

(a) The Getty Interests have exercised and will exercise their control of Mission and the Mission Board of Directors to effect the merger, the terms of which provide for substantially better treatment for the Getty Interests than stockholders of Mission other than Pacific Western (hereinafter called "the remaining stockholders"). Furthermore, the statutory rights available to dissenting stockholders of Mission are not adequate for the protection of such remaining stockholders.

(b) The conversion ratio of six shares of the common stock of the surviving corporation, of the par value of $1.00 per share, for one share of Mission is substantially less favorable to the remaining stockholders than the consideration provided for the Pacific Western Stockholders by the Getty Interests.

The Pacific Western minority stockholders have the alternative, under "Exhibit A," of taking $68.00 in cash or slightly more than the equivalent thereof in prior cumulative preferred stock of the surviving corporation, whereas the remaining stockholders of Mission must either accept the common [66] stock of the surviving corporation at the ratio negotiated for them by the Getty Interests or assert their rights as dissenters. If they accept the common stock of the surviving corporation, their interest in such corporation will be subject

to debt and senior securities in excess of $100,000,-000.00. If they elect to convert their new stock in such corporation to cash, they must take the risk of fluctuations in the market price and compete with one another in the market, and bear the cost of such liquidation, with the result that the net cash realized on their investment may be considerably less than the apparent value of six shares of the surviving corporation at current market price, whereas the Getty Interests have secured themselves against any such risk of losses and cost by arranging in advance to receive an amount certain on a particular date without any expense of liquidation or risk of diminution of the value fixed by them for their investment. The statutory rights available to dissenters do not afford them treatment equal to that which the Getty Interests have negotiated for themselves. The Getty Interests have arranged whereby their gains on this transaction shall be subject to 1947 tax laws whose provisions are certain, whereas the remaining Mission stockholders, especially dissenters, must subject themselves to 1948 tax laws which may be substantially adverse to the interests of such stockholders. Furthermore, because of the [67] price the Getty Interests have negotiated for their Pacific Western stock and the heavy strain which payment thereof will place on the credit of the surviving corporation, the remaining Mission stockholders, dissenters and non-dissenters alike, must run the risk that the claims of dissenters may be so substantial as to render insolvent the surviving cor-

poration and so render it impossible for dissenting shareholders to secure prompt payment of the fair cash value of their shares.

(c) That the sale of defendant's stock in Tide Water Associated Oil Corporation is a part of said merger plan, although not stated therein, and constitutes a partial liquidation of defendant for the sole benefit of Pacific Western Oil Corporation and its stockholders, and further is the wrongful appropriation by Pacific Western Oil Corporation and its shareholders of a business opportunity which belongs to defendant.

(d) There has been no common yardstick appraisal of the value of the assets of the constituent companies and by majority vote of defendant's Board of Directors none is to be made.

(e) The only class of stock issued by defendant and outstanding is common stock and aside from current operating expenses, which are insignificant in amount, there are no debts, bonds, or prior capital of any nature issued by or outstanding against the defendant so that the [68] said common stock represents a first and prior claim against all of its assets. The common stock of defendant represents a sound, conservative investment. The common stock of the surviving corporation to be issued in exchange for the said stock of defendant will be highly speculative in character. At the effective date of the merger agreement, a cash expenditure by Sunray of between Seventy-nine Million, Five Hundred Thousand Dollars ($79,-500,000.00) and Ninety-three Million Dollars ($93,-

000,000.00) will be required for purchase of Pacific Western Oil Corporation stock, and additional cash in the amount of Twenty-nine Million, Seven Hundred Fifty Thousand Dollars ($29,750,000.00) will be required to redeem or pay debentures and a note or notes of Sunray Oil Corporation now outstanding in the principal amount of Twenty-nine Million Dollars ($29,000,000.00). Of this amount Forty-eight Million, Eighty-six Thousand, One Hundred Seventy-five Dollars ($48,086,175.00) is to be raised through sale by the surviving corporation of Tide Water Associated Oil Corporation stock. It is proposed to raise the balance of approximately Seventy-five Million Dollars ($75,000,000.00), plus an additional Four Million Dollars ($4,000,000.00) for general funds, or a total of approximately Seventy-nine Million Dollars ($79,000,000.00), through sale to the public of securities of the surviving corporation consisting of debentures or [69] notes and preferred stock, and the successful consummation of such sale is subject to the vicissitudes of the investment market and the hazards inherent in every such operation. Further, at such effective date, as plaintiff is informed and believes, and therefore alleges the facts to be, the surviving corporation will become liable for the payment of commissions of Two Million, Forty-six Thousand Six Hundred Thirty-two Dollars ($2,046,632.00) as follows:

(a) In connection with the purchase of Pacific Western stock, One Million, Seven Hundred Fifty-four Thousand Dollars ($1,754,000.00);

(b) In connection with sale of Tide Water stock, Two Hundred Ninety-two Thousand, Six Hundred Thirty-two Dollars ($292,632.00); and will pay a premium or penalty of Seven Hundred Fifty Thousand Dollars ($750,000.00) for redemption of the debentures and note or notes of Sunray now outstanding; and in connection with said sale of Tide Water Associated Oil Corporation stock may incur an income or capital gains tax which might amount to as much as Seven Million, Five Hundred Thousand Dollars ($7,500,000.00).

In addition thereto, dissenting stockholders must be paid in cash the value of their stock. Said merger agreement contains no estimate of the amount required for that purpose, [70] nor does it provide any means of raising the money necessary therefor. The liabilities of the constituent corporations, before giving effect to the above transactions, and excluding capital stock and surplus accounts, are in excess of Thirty-five Million Dollars ($35,000,000.00).

(f) That the Getty Interests retain ownership of their stock in Pacific Western Oil Corporation, and Pacific Western Oil Corporation retains ownership of its stock in Mission Corporation, for a period of time sufficient to enable them, by voting the same, to make the merger effective and thereupon, under the terms of "Exhibit A" the Getty Interests will dispose of their said stock for cash,

will not acquire any of the securities of the surviving corporation, and will have no financial interest in the surviving corporation, and that unless said sale is consummated, the merger agreement does not become effective.

XV.

In view of the facts hereinbefore alleged and those hereinafter set forth, the proposed merger agreement, "Exhibit B" hereto, and the agreement between the Getty Interests and Sunray Oil Corporation, "Exhibit A" hereto, and the agreement for sale of said Tide Water stock are beyond the power of said corporations to make, contravene the statutes of the States of [71] Delaware and Nevada, and of the United States, and are contrary to public policy and void in this, to wit:

(a) That whether or not this defendant should enter into a merger agreement at all and, if so, the terms and conditions thereof, the ratio of exchange of stock of defendant for stock in the corporation surviving the merger, and whether or not a meeting of defendant's stockholders should be called to consider such question, have never been determined by any persons qualified or competent to act for this defendant or its stockholders.

(b) Said agreement of merger states only a part of the terms and conditions of the merger and the mode of carrying the same into effect.

(c) Pacific Western Oil Corporation and Sunray Oil Corporation are organized and exist under and by virtue of the laws of the State of Delaware, and

said laws require that in a merger of corporations the stock of the constituent corporations must be exchanged for shares or other securities of the merged or surviving corporation. Said laws do not permit the payment of cash for stock of one of the constituent corporations.

(d) That the sale of defendant's stock in Tide Water Associated Oil Corporation is a part of said merger plan, although not stated therein, and constitutes a partial liquidation of defendant for the sole benefit of Pacific Western Oil Corporation and its stockholders. [72]

(e) Said agreements permit the stockholders of Pacific Western Oil Corporation and Pacific Western Oil Corporation as a stockholder of this defendant to vote their stock for adoption of said plan and immediately thereafter to receive, at a rate determined and previously agreed upon by the Getty Interests, cash for their stock, and circumvent the statutes of Delaware and of Nevada providing for the payment of cash to dissenting stockholders and enables them to escape the operation thereof while requiring all other stockholders of defendant to be governed thereby.

(f) There is in fact no merger agreement, in that the purpose. intent, and effect of the entire transaction hereinbefore set out is to permit the Getty Interests to withdraw cash, in an amount determined and demanded by them, for their said stockholdings and control, to deplete and incumber the assets of defendant for that purpose, and to force

all shareholders of defendant other than Pacific Western Oil Corporation to accept for whatever then remains of defendant's assets junior securities in a new corporation, or in lieu thereof, force them to pursue the statutory remedy applicable to dissenting stockholders, without any provision for or assurance of the adequacy of such remedy or that funds will be available to make payment to dissenters. Article VI, Paragraph 4 of [73] "Exhibit B," the purported merger agreement, provides in part:

> "4. Anything herein or elsewhere to the contrary nothwithstanding, (a) this agreement shall not become effective and shall be null and void for all purposes if Sunray shall not have acquired, prior to or simultaneously with the time at which this agreement is otherwise to become effective, and shall not then be the owner and holder of, the 699,422 shares of Capital Stock of Pacific now owned by Thomas A. J. Dockweiler and George Franklin Getty, II, as trustees under a Declaration of Trust dated December 31, 1934, naming Sarah C. Getty as trustor and J. Paul Getty as original trustee, and the 470,027 shares of Capital Stock of Pacific now owned by J. Paul Getty, individually and as testamentary trustee under the Decree of Partial Liquidation of the Estate of Sarah C. Getty, deceased * * *

(g) Defendant is the owner of five hundred eighty-two thousand, six hundred fifty-seven (582,-657) shares, being approximately fifty-nine per cent (59%) of the capital stock of Skelly Oil Corporation, a Delaware corporation; that said five hundred eighty-two thousand, six hundred fifty-seven (582,-657) shares, at the date of this action, were of the market value of the sum of Fifty-eight Million, Two Hundred Sixty-five Thousand, Seven Hundred Dollars ($58,265,700.00); that by virtue of such stock ownership defendant has and exercises control of Skelly Oil Company, Sunray, Skelly and Pacific compete with each other in the acquisition of prospective and proven oil and gas leases and lands, in the purchase and sale of crude petroleum and natural gas, and in the purchase of equipment and facilities used in [74] connection therewith, in the States of Arkansas, Kansas, Louisiana, Montana, New Mexico, Texas and Wyoming; Skelly and Sunray so compete with each other in these additional States as well: Illinois, Mississippi, Oklahoma, Alabama, Colorado and Kentucky; and Sunray and Pacific Western so compete with each other in these additional States as well: Utah, California and Colorado. Skelly and Sunray compete with each other in the operation of refineries and natural gasoline plants, the acquisition of facilities and equipment used in connection therewith, and the sale of the products and by-products thereof, in many States. Each of said corporations is engaged in interstate commerce. If the proposed

merger be accomplished, Sunray Oil Corporation will acquire Pacific Western Oil Corporation and said Skelly Oil Company stock and will control the latter company, and the effect of such acquisition and control will be to substantially lessen or extinguish competition between Skelly, Pacific Western and Sunray, to restrain commerce in the territorial area in which said corporations operate and such acquisition may tend to create monopoly in the oil and gas business.

Wherefore, premises considered, plaintiff prays:

(a) That this complaint be considered as an application for a temporary injunction, and that the Court forthwith fix a date for its hearing as such, and that upon such hearing a [75] temporary injunction issue enjoining and restraining defendant, its officers, agents and employees from proceeding further with said proposed merger and enjoining and restraining defendant, its officers and agents, from holding, on December 6, 1947, or any other date, a stockholders' meeting to consider and vote upon said purported agreement of merger.

(b) That upon final hearing hereof defendant, its officers, agents and employees be enjoined from proceeding further with said proposed merger, from entering into the same, and from holding any stockholders' meeting to consider and vote upon said purported agreement of merger.

(c) That defendant be ordered to pay to plaintiff the reasonable cost and expense of this action, in-

cluding a reasonable attorney's fee for plaintiff's attorneys, and the costs of procuring depositions and evidence.

(d) That plaintiff have such other and further relief as may be equitable and just.

JOHN P. THATCHER,
WM. WOODBURN,
VILLARD MARTIN,
GARRETT LOGAN,
THEODORE RINEHART,
HAROLD C. STUART,
Attorneys for Plaintiff. **[76]**

EXHIBIT A

Memorandum of Agreement among Sunray Oil Corporation, a Delaware corporation (hereinafter called "Sunray"), Thomas A. J. Dockweiler and George Franklin Getty, II, as Trustees under that certain Declaration of Trust dated December 31, 1934, wherein Sarah C. Getty is named as trustor and J. Paul Getty as original trustee, (hereinafter called "Trustees") and J. Paul Getty, individually and as testamentary trustee under the Decree of Partial Distribution of the Estate of Sarah C. Getty, deceased, (hereinafter called "Getty");

Whereas, The Trustees and Getty are the owners and record holders of 699,422 shares and 470,027 shares, respectively, of capital stock of Pacific Western Oil Corporation (hereinafter called "Pacific"), out of a total of 1,371,730 shares of capital stock of Pacific issued and outstanding (exclusive of shares held in the treasury of Pacific); Pacific

is the owner and record holder of 641,808 shares of capital stock of Mission Corporation (hereinafter called "Mission"), out of a total of 1,374,145 shares of Mission issued and outstanding (exclusive of shares held in the treasury of Mission); and Mission is the owner and record holder of 582,657 shares of stock of Skelly Oil Company (hereinafter called "Skelly"), out of a total of 981,348.6 shares of capital stock of Skelly issued and outstanding (exclusive of shares held in the treasury of Skelly); and

Whereas, Sunray is desirous of bringing about a merger of Pacific, Mission and Skelly with and into Sunray, under the laws of Delaware (in which state Pacific, Skelly and Sunray are organized) and of Nevada (in which state Mission is organized); and [77]

Whereas, if such a merger can be consummated on terms which are fair and equitable to the holders of the securities of the respective companies, Sunray desires to purchase from the Trustees and from Getty, respectively, and the Trustees and Getty, respectively, desire to sell to Sunray, the shares of capital stock of Pacific held by them respectively at the prices and on the terms and conditions hereinafter contained;

Now, Therefore, in consideration of the premises and of the mutual agreements hereinafter contained, the parties hereto agree as follows:

1. Sunray agrees that it will use its best efforts, subject to the conditions hereinafter contained, to negotiate and cause to be consummated the merger of Pacific, Mission and Skelly into Sunray upon terms mutually agreeable to the respective boards

of directors and holders of the requisite number of shares of the stock of the respective companies.

2. Sunray agrees that immediately prior to such merger becoming effective it will purchase from the Trustees and from Getty, respectively, and the Trustees and Getty, respectively, agree that they will, at that time, sell to Sunray at the price of $68.00 per share cash their respective holdings of stock of Pacific, the agreement of merger to provide that the shares so purchased shall be cancelled.

3. The obligation of the Trustees and Getty to sell shall be subject to the following conditions: [78]

(a) Both the Trustees and Getty shall be satisfied, either through obtaining a closing agreement or, at their option, a ruling from the Internal Revenue Department or an opinion of counsel on which they are satisfied to rely, that any profits realized by them, or any of the beneficiaries of said Sarah C. Getty Trust dated December 31, 1934, upon such sale shall be taxable as capital gains under the Internal Revenue Code, and that none of said persons will incur liability as alleged transferees of Pacific as a result of such sale and the subsequent consummation of the merger.

(b) That the sale of such stock be made and the purchase price paid prior to December 23, 1947.

(c) That the holders of shares of Pacific other than the Trustees and Getty also be given an opportunity to sell their shares to Sunray at $68.00 per share, cash, the purchase price to be paid by Sunray to such stockholders or

their agents simultaneously with payment to the Trustee and Getty.

4. The Trustees and Getty have made and are making no representations or warranties of any kind or character in connection with this agreement or the sale of their holdings of Pacific, as provided for herein, and they and each of them are to be completely free from any liability for any alleged misrepresentation, breach of warranty, or non-disclosure concerning Pacific, Mission, Skelly, or the assets, businesses, properties, liabilities, financial condition, or past or present transactions of those corporations, or any of them.

5. The obligation of Sunray to purchase said shares of Pacific from the Trustees and Getty shall be subject to the following conditions:

(a) Sunray shall be satisfied, either through obtaining a closing agreement or, at its option, a ruling from the Internal Revenue Department or an opinion of counsel on which it is satisfied to rely, that the merger will constitute a tax free reorganization [79] within the meaning of Section 112 of the Internal Revenue Code.

(b) That present arrangements for the financing necessary to enable Sunray to purchase the shares of Pacific herein provided for and to consummate the merger, in accordance with the arrangements set forth in Exhibit "I" annexed hereto, which Sunray represents it has made with Eastman, Dillon & Co., or other adequate arrangements for such financing are successfully concluded.

(c) That both the Trustees and Getty sell and deliver the shares of capital stock of Pacific agreed to be sold by them respectively.

(d) That there will be no substantial adverse changes in the financial conditions of Pacific, Mission or Skelly, as shown on the respective balance sheets dated August 31, 1947, other than such as have occurred or may occur in the usual course of business.

In Witness Whereof, the parties hereto have executed this document under seal this 4th day of October, 1947.

Attest:

SUNRAY OIL CORPORATION,
By /s/ C. H. WRIGHT,
Pres.

/s/ THOMAS A. J. DOCKWEILER,
(L. S.)

/s/ GEORGE FRANKLIN
GETTY II,
(L. S.)

Trustees under that certain Declaration of Trust dated December 31, 1934, wherein Sarah C. Getty is named as trustor and J. Paul Getty as original trustee. [80]

/s/ J. PAUL GETTY,
(L. S.)

Individually and as testamentary trustee under the Decree of Partial Distribution of the Estate of Sarah C. Getty, deceased. [81]

EXHIBIT I

NSS:G 10/3/47 8c

This Agreement, made as of this 4th day of October, 1947, by and between Sunray Oil Corporation, a Delaware corporation (hereinafter called "Sunray"), and Eastman, Dillon & Co., a New York partnership (hereinafter called "Eastman Dillon"),

Witnesseth:

Whereas, Sunray is, simultaneously with the execution of this agreement, entering into an agreement (hereinafter called the "Getty Agreement") with Thomas A. J. Dockweiler and George Franklin Getty II, as Trustees, under that certain Declaration of Trust dated December 31, 1934, wherein Sarah C. Getty is named as trustor and J. Paul Getty as original trustee (hereinafter called "Trustees"), and J. Paul Getty individually and as Testamentary Trustee under the Decree of Partial Distribution of the Estate of Sarah C. Getty, deceased (hereinafter called "Getty"), under which Agreement Sunray agrees to purchase from Getty and the Trustees an aggregate of 1,169,449 shares of capital stock of Pacific Western Oil Corporation, a Delaware corporation (hereinafter called "Pacific Western") at $68 per share and agrees that the holders of the remaining outstanding shares of Pacific Western stock shall be given an opportunity to obtain the same price for their shares, all upon the terms and subject to the conditions therein set forth; and

Whereas, the Getty Agreement contemplates that immediately after the purchase of the Pacific Western stock, a merger shall be effected whereby Pacific Western, Mission Corporation, a Nevada corporation (hereinafter called "Mission"), and Skelly Oil Corporation, a Delaware corporation (hereinafter called "Skelly") will be merged into Sunray, as the continuing and surviving corporation; and [82]

Whereas, Sunray is also desirous of obtaining the assistance of Eastman Dillon in obtaining funds sufficient to reimburse it for the cost of the Pacific Western stock to be purchased pursuant to the Getty Agreement and to provide for cash requirements which may arise upon the merger as hereinafter mentioned, and Eastman Dillon is willing to provide such assistance upon the terms and conditions hereinafter set forth;

Now, Therefore, it is mutually agreed between the parties hereto as follows:

1. It is contemplated that, simultaneously with, or immediately after, the above-described merger's becoming effective, Sunray will obtain cash funds in an amount sufficient to reimburse it for the cost of the Pacific Western stock purchased by Sunray prior to the merger and pursuant to the Getty Agreement, or a maximum of approximately $93,300,000, such funds to be obtained (a) by borrowing from banks, (b) by the sale of a new issue of Debentures, and (c) by the sale of a new issue of Convertible Preferred Stock, and (d) possibly in part, to as much as $50,000,000, by the sale of certain assets to be acquired by Sunray as a result

of the merger. The aggregate amount so to be obtained may be decreased to the extent that stockholders of Pacific Western (other than Getty and the Getty Trust) decline to accept the offer to purchase their shares which Sunray agrees to make pursuant to the Getty Agreement; but such amount may also be subject to increased in the event that the parties hereto shall deem it advisable to provide cash funds to offset possible cash requirements of any of the constituent corporations which may arise as a consequence of such merger from exercise of any right of appraisal by any of the stockholders of any of such corporations.

In the event that no sale is made of assets to be acquired by Sunray upon the merger, as referred to above in clause (d) of [83] this paragraph 1, it is understood that the funds to be raised through bank loans and the sale of Debentures may amount to as much as $55,000,000, with the balance to be obtained through the sale of Convertible Preferred Stock; or, conversely, the funds to be raised through the sale of Convertible Preferred Stock may amount to as much as $55,000,000, with the balance to be obtained through bank loans and the sale of Debentures. In any event, the respective amounts of bank loans, Debentures and Convertible Preferred stock, and the respective terms and provisions thereof, shall be such as are agreed upon between the parties hereto, and Eastman Dillon shall formulate and recommend such respective amounts, terms and provisions as, in its best judgment, are most appropriate and advisable for Sunray under the circumstances.

2. Eastman Dillon agrees to use its best efforts to formulate a plan for the merger of Pacific Western, Mission and Skelly into Sunray which will be acceptable to the respective boards of directors and requisite number of stockholders of the constituent corporations and which will enable Sunray to accomplish the financing referred to in paragraph 1 hereof. Without restricting Eastman Dillon in the exercise of discretion in formulating and recommending such a plan of merger, it is now contemplated that such merger may be made on the following basis:

(1) Each outstanding share of capital stock of Pacific Western, of the par value of $10 per share, not purchased by Sunray as above provided, shall be changed into 7/10 of a share of new 4½ Preferred Stock, of the par value of $100 per share, of Sunray;

(b) Each share of capital stock of Mission, of the par value of $10 per share, and each share of common stock of Skelly, of the par value of $15 per share, respectively, is to be changed into such number of [84] shares of common stock of Sunray as shall be equitable under the circumstances and acceptable to the respective boards of directors; and

(c) Each share of Preferred Stock of Sunray is to be changed into 1 share of new 4½ Preferred Stock, of the par value of $100 per share, of Sunray, and each share of present common stock of Sunray, of the par value of $1 per share, is to remain unchanged.

3. Eastman Dillon agrees that it will assist Sunray in negotiating and consummating a bank loan or loans for the purpose specified in, and in the aggregate amount to be agreed upon as provided for in, paragraph 1 hereof.

4. Eastman Dillon further agrees that, subject to the public offering of the Convertible Preferred Stocks as provided for in paragraph 5 hereof, it will arrange for the private sale by Sunray (i. e., without the necessity of registration under the Securities Act of 1933) of an issue of Debentures as referred to in paragraph 1 hereof, or, in the alternative for the purchase of such Debentures for re-offering to the public as provided for in paragraph 6 hereof. In the event of any such private sale, Eastman Dillon shall be entitled to receive, and Sunray shall pay, a placement fee equal to such percentage of the principal amount of Debentures so sold by Sunray as shall be agreed upon.

5. Eastman Dillon further agrees that it will form a group of investment banking firms, in which it will be included, which will agree, subject to the aforesaid merger's becoming effective, to purchase from Sunray for re-offering to the public such aggregate principal amount of Debentures not privately sold by Sunray as provided for in paragraph 4, and such number of shares of Convertible Preferred Stock, at such aggregate agreed net price to [85] Sunray (exclusive of expenses), as will provide Sunray with that part of the funds described in paragraph 1 hereof as it shall be de-

termined are not to be obtained through bank loans, private sale of Debentures and sale of assets as hereinbefore referred to. Eastman Dillon agrees that it and the other members of the proposed investment banking group will enter into an underwriting agreement or underwriting agreements providing for the purchase and re-offering to the public of such Debentures, if any, and such Convertible Preferred Stock, such underwriting agreement or agreements to be substantially in the form of the agreement between Sunray and Eastman Dillon dated July 23, 1946 (a copy of which is annexed hereto as Exhibit A), with such additions, changes and modifications (including, without limitation, differences as to prices to the issuing corporation and underwriting discounts) as shall be appropriate under the circumstances. It is expressly understood, however, that the obligation of Eastman Dillon and the other proposed underwriters to enter into such agreement or agreements shall be subject to the condition that at the time such agreement is to be executed, political, economic or market conditions shall not be such as, in the judgment of Eastman Dillon, to render the re-offering of such securities impractical or inadvisable.

6. Each of the parties hereto agrees to use its best efforts to accomplish all of the objectives of this agreement on or prior to December 22, 1947.

7. This agreement shall bind and inure to the benefit of the parties hereto, their respective successors and assigns.

In Witness Whereof, the parties hereto have duly executed this agreement as of the day and year first above written.

SUNRAY OIL
CORPORATION,

/s/ C. H. WRIGHT,
President.

EASTMAN, DILLON & CO.

EXHIBIT B

AGREEMENT OF MERGER

Between Sunray Oil Corporation (a Delaware corporation) and a majority of its directors, Pacific Western Oil Corporation (a Delaware corporation) and a majority of its directors, and Mission Corporation (a Nevada corporation) and a majority of its directors.

Merging pursuant to Section 59 of the General Corporation Law of the State of Delaware and Section 39 of the General Corporation Law of the State of Nevada into Sunray Oil Corporation as the Surviving Corporation. [87]

Agreement of merger, dated the 18th day of October, 1947, by and between Sunray Oil Corporation, a Delaware corporation (hereinafter sometimes called "Sunray"), and a majority of the directors thereof, parties of the first part, Pacific Western Oil Corporation, a Delaware corporation (hereinafter sometimes called "Pacific"), and a majority of the directors thereof, parties of the second part, and Mission Corporation, a Nevada corporation (herein-

after sometimes called "Mission"), and a majority of the directors thereof, parties of the third part, Witnesseth:

Whereas, Sunray is a corporation duly organized and existing under the laws of the State of Delaware, having been incorporated on February 15, 1929, under the General Corporation Law of the State of Delaware, and has an authorized capital stock consisting of 470,000 shares of Preferred Stock, of the par value of $100 each, issuable in series, of which on October 1, 1947, 270,000 shares of 4¼% Cumulative Preferred Stock, Series A (hereinafter sometimes called "old Preferred Stock of Sunray"), were issued and outstanding, including 8,106.4 shares held in the treasury of Sunray which are to be retired prior to the effective date of this agreement, and 5,000,000 shares of Common Stock, of the par value of $1 each, of which on October 1, 1947, 4,671,185.8 shares were issued and outstanding, including 28,615,525 shares held in the treasury of Sunray; and

Whereas, Pacific is a corporation duly organized and existing under the laws of the State of Delaware, having been incorporated on November 10, 1928, under the General Corporation Law of the State of Delaware, and has an authorized capital stock consisting of 2,000,000 shares of capital stock, of the par value of $10 each (hereinafter sometimes called "Capital Stock of Pacific"), of which on October 1, 1947, 1,376,430 shares were issued and outstanding, including 4,700 shares held in the treasury of Pacific; and

Whereas, Mission is a corporation duly organized and existing under the laws of the State of Nevada, having been incorporated on December 31, 1934, under the General Corporation Law of the State of Nevada, and has an authorized capital stock consisting of 1,500,000 shares of capital stock, of the par value of $10 each (hereinafter sometimes called "Capital Stock of Mission"), of which on October 1, 1947, 1,379,545 shares were issued and outstanding including 5,400 shares held in the treasury of Mission and 641,808 shares owned by Pacific; and

Whereas, a majority of the directors of each of said corporations deems it advisable that said corporations merge, and said corporations, respectively, desire that they merge, under the General Corporation Law of the State of Delaware and the General Corporation Law of the State of Nevada;

Now, therefore, in consideration of the premises and of the mutual agreements, provisions, covenants and grants herein contained, the parties hereto hereby agree, in accordance with the provisions of the General Corporation Law of the State of Delaware and the General Corporation Law of the State of Nevada, that Sunray, Pacific and Mission shall be, and they hereby are, merged into a single corporation existing under the laws of the State of Delaware, to wit, Sunray, one of the parties hereto, and that Sunray shall merge, and it does hereby merge, into itself, Pacific and Mission and Pacific and Mission shall merge, and they do hereby merge, themselves into Sunray; and that the terms and conditions of the merger hereby agreed upon (hereinafter sometimes called the "merger") and the

mode of carrying the same into effect and the manner of converting the shares of each of said constituent corporations into shares of the surviving corporation, are and shall be as hereinafter set forth; and that the Certificate of Incorporation, as amended, of Sunray shall, on the effective date of this agreement, be and be deemed to be further amended as hereinafter set forth.

Article I.

Except as herein otherwise specifically set forth, the name, identity, existence, purposes, powers, franchises, rights and immunities of Sunray shall continue unaffected and unimpaired by the merger, and the corporate identities, existence, purposes, powers, franchises, rights and immunities of Pacific and Mission shall be merged into Sunray and Sunray shall be fully vested therewith. The respective organizations of Pacific and Mission, except in so far as they may be continued by statute, shall cease as soon as this agreement shall become effective, and thereupon Sunray, Pacific and Mission shall become a single corporation, existing under the laws of the State of Delaware, to wit, Sunray, one of the parties hereto. Sunray, Pacific and Mission are hereinafter sometimes called the "Constituent Corporations," Sunray as the single corporation which shall survive the merger is hereinafter sometimes called the "Surviving Corporation," and the date upon which the Constituent Corporations shall so become said single corporation is herein sometimes called the "effective date of this agreement."

Article II.

The Certificate of Incorporation of the Surviving Corporation, as amended, shall, on the effective date of this agreement, be and be deemed to be further amended to read as follows (the term "Corporation" as used in this Article referring to the "Surviving Corporation"):

First: The name of the Corporation is Sunray Oil Corporation.

Second: The principal office of the Corporation in the State of Delaware is located at No. 100 West Tenth Street, in the City of Wilmington, County of New Castle. The name and address of its resident agent is The Corporation Trust Company, No. 100 Tenth Street, Wilmington, Delaware.

Third: The nature of the business of the Corporation and the objects and purposes to be transacted, promoted or carried on by it are;

1. To buy, lease, hire, contract for, invest in, and otherwise acquire, and to own, hold, maintain, equip, operate, manage, mortgage, deal in and with, and to sell, lease, exchange and otherwise dispose of oil, gas, mineral and mining lands, wells, quarries, leases, rights, royalties, claims, locations, patents, concessions, easements, rights of way, and franchises, real property, and all interests therein, and lands containing or believed to contain petroleum, mineral, animal, vegetable and other oils, asphaltum, natural gas, gasoline, naphthene, oil shales, sulphur, salt, clay, coal, minerals, mineral substances, metals, ores of every kind, or other mineral

or volatile substances, and the stocks, bonds, notes, debentures, evidences of indebtedness, or obligations of corporations, companies, associations, trusts, organizations, firms, or individuals engaged in any similar business or otherwise, and to carry on in all its branches the business of exploring and drilling for, producing, gathering, storing, transporting, refining, distributing, marketing, selling and dealing in and with petroleum, mineral, animal, vegetable and other oils, asphaltum, natural gas, gasoline, naphthene, oil shales, sulphur, salt, clay, coal, minerals, mineral substances, metals, ores of every kind, or other mineral or volatile substances and products, by-products and derivatives thereof.

2. To produce, gather, refine, buy, contract for, invest in, and otherwise acquire, and to store, own, hold, mortgage, deal in and with, and to market, sell, exchange, and otherwise dispose of, and to transport, distribute, import and export petroleum, mineral, animal, vegetable, and other oils, asphaltum, natural gas, gasoline, naphthene, oil shales, sulphur, salt, clay, coal, minerals, mineral substances, metals, ores of every kind, or other mineral or volatile substances, and products, by-products and derivatives thereof.

3. To build, construct, buy, lease, hire, contract for, invest in, and otherwise acquire, and to own, hold, maintain, equip, operate, manage, mortgage, and deal in and with, and to sell lease, exchange and otherwise dispose of, refineries, factories, plants, works, buildings, houses, machinery, equipment, appliances, tanks, reservoirs, warehouses,

storage facilities, elevators, terminals, markets, docks, piers, wharves, drydocks, bulkheads, pipe lines, pumping stations, tank cars, trams, automobiles, trucks, cars, tankers, ships, tugs, lighters, barges, boats, vessels, aircraft and any other vehicles or craft for land, water or air transportation, for prospecting, exploring, and drilling for, producing, gathering, manufacturing, refining, treating, storing, transporting, handling, distributing, marketing, importing and exporting, petroleum, mineral, animal, vegetable and other oils, asphaltum, natural gas, gasoline, naphthene, oil shales, sulphur, salt, clay, coal, minerals, mineral substances, metals, ores of every kind, or other mineral or volatile substances, and products, by-products and derivatives thereof, hotels, and all property of every kind and character, to the extent that the same is or may be authorized by the laws of Delaware, and by the laws of any jurisdiction wherein any such property is located.

4. To the extent permitted by law, to build, construct, buy, lease, hire, contract for, invest in and otherwise acquire, and to own, hold, maintain, equip, operate, manage, mortgage, and deal in and with, and to sell, lease, exchange, and otherwise dispose of, railroads, tramways, turnpikes, runways, canals, and other means of land, water or air transportation, construction and repair shops and plants, irrigation, sewage, heat, light and power plants and systems, bridges, dams, embankments, reservoirs, ditches, reclamation, drainage, and sanitary works and systems, and water rights, works and systems,

useful or advisable, in the judgment of the Board of Directors of this Corporation, for its business.

5. To prospect, explore, drill and bore for, and to extract, produce, mine, mill, separate, convert, smelt, concentrate, evaporate, purify, skim, refine, reduce, crack, sweat, or treat in any manner or by any process whatsoever, blend, compound, manufacture, gather, store, transport, handle, distribute, market, buy, sell and deal in and with petroleum, mineral, animal, vegetable, and other oils, asphaltum, natural gas, gasoline, naphthene, oil shales, sulphur, salt, clay, coal, minerals, mineral substances, metals, ores of every kind, or other mineral or volatile substances, and products, by-products and derivatives thereof.

6. To do engineering and contracting, and to design, construct, drill, bore, sink, develop, improve, extend, maintain, operate and repair, wells, mines, plants, works, machinery, equipment, appliances, storage and transportation lines and systems, for this Corporation and for others.

7. To the extent permitted by law, to build, construct, buy, lease, hire, contract for, invest in, and otherwise acquire, and to own, hold, maintain, equip, operate, manage, mortgage, and deal in and with, and to sell, lease, exchange and otherwise dispose of, telegraph, telephone, radio and transportation lines, plants and systems, by air, land or water, useful or advisable, in the judgment of the Board of Directors of this Corporation, for its business.

8. To organize corporations, companies, associations, trusts, or organizations, under the laws of any

state, district, territory, nation, province, or government, and to sell, exchange, convey, assign, transfer, deliver and otherwise dispose of, to such corporations, companies, associations, trusts, or organizations, any part of the property, assets, and effects of this Corporation, less than the whole thereof, in exchange for the capital stock, bonds, notes, debentures or other securities, evidences of indebtedness or obligations of such corporations, companies, associations, trusts, or organizations, upon such terms and conditions as the Board of Directors shall determine.

9. To organize or cause to be organized under the laws of any state, district, territory, nation, province or government, corporations, companies, associations, trusts, or organizations for the purpose of accomplishing any or all of the objects for which this Corporation is organized, and to dissolve, wind up, liquidate, merge or consolidate the same, or cause the same to be dissolved, wound up, liquidated, merged or consolidated, and to organize, incorporate and reorganize corporations, companies, associations, trusts, or organizations, for any purpose permitted by law.

10. To subscribe to, buy, invest in, and otherwise acquire, to own, hold, deal in and with, and to sell, exchange, transfer, mortgage, pledge, hypothecate, or otherwise dispose of, the stocks, bonds, notes, debentures or other evidences of indebtedness or obligations of any individual, firm, corporation, company, association, trust, or organization, or of any private, public, quasi-public, or municipal cor-

poration, domestic or foreign, or of any domestic or foreign state, government or governmental authority, or of any political or administrative subdivision or department thereof; and all trust, participation or other certificates of or receipts evidencing interest in any such securities; and, while the owner of any such stocks, bonds, notes, debentures, evidences of indebtedness, obligations, certificates or receipts, to exercise all the rights, powers and privileges of ownership, including the right to vote thereon for any and all purposes; and to loan money, and to take notes, open accounts and other similar evidences of debt as collateral security therefor.

11. To guarantee the payment of dividends on, or the payment of the principal of, or interest on, any stocks, bonds, notes, debentures, or other securities, evidences of indebtedness or obligations of any individual, firm, corporation, company, association, trust, or organization in which this [89] Corporation has an interest as stockholder, creditor or otherwise, or whose shares or securities it owns; to become surety for, and to guarantee the carrying out or performance of contracts, of every kind and character, of any individual, firm, corporation, company, association, trust or organization in which this Corporation has an interest as stockholder, creditor or otherwise, or whose shares or securities it owns.

12. To aid, by loan, subsidy, guaranty, or in any lawful manner whatsoever, any individual, firm,

corporation, company, association, trust, or organization whose stocks, bonds, notes, debentures or other securities or evidences of indebtedness or obligations are in any manner directly or indirectly held or guaranteed by this Corporation, or by any corporation in which this Corporation may have an interest as stockholder, creditor, guarantor, or otherwise, or whose shares or securities it owns, and to do any and all lawful acts and things designed to protect, preserve, improve or enhance the value of any stocks, bonds, notes, debentures or other securities, or evidences of indebtedness or obligations of any individual, firm, corporation, company, association, trust or organization in which this Corporation has an interest as stockholder, guarantor, creditor, or otherwise, or whose shares or securities it owns, and to lend money with or without collateral security.

13. To buy, lease, contract for, invest in, and otherwise acquire, and to own, hold, mortgage and deal in and with, and to sell, lease, exchange, transfer, convey and otherwise dispose of, rights and interests of every character and description, in or to or relating to, petroleum, mineral, animal, vegetable and other oils, asphaltum, natural gas, gasoline, naphthene, oil shales, sulphur, salt, clay, coal, minerals, mineral substances, metals, ores, or any other mineral or volatile substances, and in or to or relating to lands containing or believed to contain any of such substances, and leases, grants and contracts relating thereto, and relating to rights and interests of every character and description.

14. To manufacture, produce, buy, lease, hire, contract for, invest in, and otherwise acquire, and to own, hold, maintain, equip, mortgage and deal in and with, and to sell, lease, exchange, and otherwise dispose of, and to transport, import and export personal property of every character and description, without limit as to amount or value, in any part of the world, and any interest or right therein.

15. To buy, lease, contract for, invest in, and otherwise acquire, and to own, hold, maintain, equip, manage, improve, develop, mortgage, and deal in and with, and to sell, lease, exchange, transfer, convey and otherwise dispose of, real property, concessions, grants, land patents, franchises, easements, and rights of way, without limit as to amount or value, in any part of the world, and any royalty or other interest or right therein.

16. To manufacture, produce, construct, convert, buy, lease, hire, contract for, invest in, and otherwise acquire, and to hold, own, maintain, equip, operate, mortgage, and deal in and with, and to sell, lease, exchange and otherwise dispose of, export and import goods, wares, merchandise, machinery, equipment, appliances, materials and products of every kind and description, and do manufacturing and merchandising of every kind, and to carry on a general mercantile and commercial business in any part of the world.

17. To buy, lease, hire, contract for, invest in, and otherwise acquire, any property, real or personal, which it may deem desirable for the purpose of its business for cash, or otherwise, and to issue

its stocks, bonds, notes, debentures or other securities or evidences of indebtedness or obligations in payment therefor.

18. To sell, lease, exchange, convey, mortgage, transfer, assign and deliver, and otherwise dispose of, any part of the property, assets and effects of this Corporation, less than the whole thereof, and receive in payment therefor stocks, bonds, notes, debentures, or other securities or evidences of indebtedness or obligations of any individual firm, corporation, company, association, trust or organization, on such terms and conditions as the Board of Directors of this Corporation shall determine.

19. To purchase or acquire in any manner the stocks, bonds, notes, debentures or other securities or evidences of indebtedness, or obligations of any individual, firm, corporation, company, association, trust, or organization, and to issue its stocks, bonds, notes, debentures, or other securities or evidences of indebtedness or obligations in payment therefor, on such terms and conditions as the Board of Directors of this Corporation shall determine.

20. To purchase or otherwise acquire shares of its own capital stock, bonds, notes, debentures, or other obligations, and to hold, sell, exchange, mortgage, pledge, hypothecate, or otherwise dispose of or retire the same, provided that this Corporation shall not use any of its funds or property for the purchase of its own shares of capital stock when such use would cause any impairment of the capital of this Corporation, and provided, further, that the shares of its own capital stock belonging to this Corporation shall not be voted directly or indirectly.

21. To apply for, obtain, register, purchase, lease, or otherwise acquire, and hold, own, use, operate, introduce, sell, exchange, lease, assign, pledge, or otherwise dispose of, deal in, turn to account, or contract with reference to, any and all copyrights, trade-marks, trade names, labels, designs, brands, patents, and applications therefor, licenses, inventions, improvements, concessions, apparatus, appliances, formulae, and processes, used in connection with or secured under letters patent of the United States, or elsewhere, or otherwise; and to use, exercise, develop, grant licenses in respect of, or otherwise turn to account, any such copyrights, trade-marks, trade names, labels, designs, brands, patents, applications, licenses, inventions, improvements, concessions, apparatus, appliances, formulae, processes and the like, or any property, right, or information in connection therewith; and to grant and issue licenses or sublicenses, partial, exclusive, or territorial, under or in respect of any and all such copyrights, trade-marks, trade names, labels, designs, brands, patents, applications, licenses, inventions, improvements, concessions, apparatus, appliances, formulae and process.

22. To borrow money for its corporate purposes, and to draw, make, accept, endorse, execute and issue bonds, notes, debentures, bills of exchange, warehouse receipts, warrants and other negotiable instruments and obligations, and in order to secure the same, or any of its contracts or obligations, to

convey, transfer, assign, mortgage, pledge and deliver all or any part of the property of this Corporation upon such terms and conditions as the Board of Directors shall determine.

23. To make, perform and carry out contracts of every kind made for any lawful purpose with, and to act as agent, representative or factor for, any individual, firm, corporation, company, association, trust, or organization, or any public, quasi-public, or municipal corporation, domestic or foreign, or any domestic or foreign state, government or governmental authority or agency.

24. To purchase, or otherwise acquire, the whole or any part of the property, assets, business, good will, rights and franchises of any individual, firm, corporation, company, association, trust, or organization; to assume the whole or any part of the bonds, mortgages, franchises, leases, contracts, indebtedness, guarantees, liabilities and obligations of any individual, firm, corporation, company, association, trust, or organization, or give guarantees in respect thereof; and to hold or in any manner dispose of the whole or any part of the property, assets, business, good will, rights and franchises so purchased or acquired, and to conduct and manage, in any lawful manner, the whole or any part of any business so purchased or acquired, and to exercise all the powers, necessary or convenient in and about the conduct and management thereof.

25. To carry on any other lawful business or operation deemed advantageous, desirable or incidental to any of the purposes herein specified, or

calculated, directly or indirectly, to promote the interests of this Corporation, or to enhance the value of its properties, securities, or assets of any kind whatsoever.

26. To execute and deliver general or special powers of attorney to individuals, firms, corporations, companies, associations, trusts and organizations in the United States, or any other country, and to revoke the same as the Board of Directors shall determine.

27. To have one or more of its offices, and to carry on any or all of its operations and business, within or without the State of Delaware, in any part of the world, and to have and exercise all the rights and powers now or hereafter conferred by the laws of the State of Delaware upon corporations organized under the same statutes as this Corporation. [90]

The foregoing clauses shall be construed both as objects and powers, and the foregoing enumeration of specific powers shall not be held to limit or restrict in any manner the powers of this Corporation; and the purposes, objects and powers specified in each of the paragraphs of Article Third hereof shall, except as otherwise expressly provided, in nowise be limited or restricted by reference to or inference under the terms of any other article, clause or paragraph hereof, but each of the purposes, objects and powers specified herein shall be regarded as independent purposes, objects and powers.

Fourth: The total number of shares of all classes of stock which the Corporation shall have authority to issue is 15,800,000 shares, of which 500,000 shares shall be Cumulative Prior Preferred Stock of the par value of $100 each (hereinafter called "Prior Preferred Stock"), 300,000 shares shall be Cumulative Second Preferred Stock, of the par value of $100 each (hereinafter called "Second Preferred Stock") and 15,000,000 shares shall be Common Stock, of the par value of $1 each (hereinafter called "Common Stock").

A statement of the designations and the powers, preferences and rights, and the qualifications, limitations or restrictions thereof, of the shares of stock of each class which the Corporation shall have authority to issue, the fixing of which by the Certificate of Incorporation, as amended, is desired, and the grant of authority to the Board of Directors to fix by resolution or resolutions the designations and the powers, preferences and rights, and the qualifications, limitations or restrictions thereof, of the respective series of Prior Preferred Stock and Second Preferred Stock which are not fixed herein, is as follows:

Prior Preferred Stock

1. The Prior Preferred Stock may be issued from time to time in one or more series. The designations, preferences and relative, participating, optional and other special rights of each such series and the qualifications, limitations or restrictions thereof may differ from those of any and all other

series already outstanding, and the Board of Directors of the Corporation is hereby expressly granted authority, subject to the provisions hereof, to fix, by resolution or resolutions adopted prior to the issuance of any shares of a particular series of Prior Preferred Stock, the designations, preferences and relative participating, optional and other special rights of such series, and the qualifications, limitations or restrictions thereof, in any or all of the following, but in no other, respects:

(a) the number of shares to constitute such series and the designation of such series;

(b) the rate of dividends (not exceeding 7% per annum) which the shares of such series shall be entitled to receive and the date or dates from which dividends thereon shall be cumulative;

(c) the amount of the premium, if any (not exceeding $10 per share), over and above $100 per share and any accrued dividends thereon, which the shares of such series shall be entitled to receive upon the redemption thereof;

(d) the amount of the premium, if any (not exceeding $10 per share), over and above $100 per share and any accrued dividends thereon, which the shares of such series shall be entitled to receive upon the voluntary dissolution, liquidation or winding up of the Corporation;

(e) the right, if any, of holders of shares of such series to convert the same into or exchange

the same for stock of any other series or class or other securities and the terms and conditions of such conversion or exchange; and

(f) the terms of any purchase fund or sinking fund for the purchase or redemption of shares of such series;

provided, however, that the initial series of Prior Preferred Stock shall consist of 403,500 shares, shall be designated "Cumulative Prior Preferred Stock, 4½% Series of 1947" (hereinafter called "1947 Prior Preferred Stock") shall have the dividend rate and the dates from which dividends thereon shall be cumulative, shall be entitled to receive the respective premiums upon redemption or upon the voluntary dissolution, liquidation or winding up of the Corporation and shall be entitled to the benefit of the sinking fund, provided in Section 10 of this Article Fourth, and shall have no right of conversion or exchange. All shares of Prior Preferred Stock of the same series shall be identical in all respects except, if so provided, as to the dates from which dividends become cumulative, and all shares of Prior Preferred Stock of all series shall be of equal rank and shall be identical in all respects except as permitted by the foregoing provisions of this Section 1.

2. The holders of Prior Preferred Stock of each series shall be entitled to receive, and the Corporation shall be bound to pay, only as and when declared by the Board of Directors and out of funds legally available for the payment of dividends,

cumulative dividends, in the case of 1947 Prior Preferred Stock, at the rate fixed in Section 10 of this Article Fourth, and in the case of Prior Preferred Stock of each other series, at the annual rate fixed with respect to such series in accordance with Section 1 of this Article Fourth, and no more, payable in cash, quarterly, on the first days of January, April, July and October in each year. In case Prior Preferred Stock of more than one series is outstanding, the Corporation, in making any dividend payment upon the Prior Preferred Stock, shall make dividend payments ratably upon all outstanding shares of Prior Preferred Stock of all series in proportion to the amount of dividends accrued thereon to the date of such dividend payment. If dividends on any shares of Prior Preferred Stock shall be in arrears, the holders thereof shall not be entitled to any interest, or sum of money in lieu of interest, thereon.

3. The Corporation, at the option of the Board of Directors, may redeem at any time, or from time to time, any series of Prior Preferred Stock or any part of any series, at $100 per share, plus accrued dividends thereon to the date fixed for redemption, plus a premium, in the case of the 1947 Prior Preferred Stock, in the amount fixed in Section 10 of this Article Fourth, and in the case of Prior Preferred Stock of any other series, in the amount, if any, fixed with respect to such series in accordance with Section 1 of this Article Fourth (the total amount per share so payable upon any redemption of Prior Preferred Stock being herein referred to

as the "redemption price"); provided, however, that not less than 30 days previous to the date fixed for redemption a notice of the time and place thereof shall be given to the holders of record of the shares of Prior Preferred Stock so to be redeemed, by mailing a copy of such notice to such holders at their respective addresses as the same appear upon the books of the Corporation. In case of redemption of less than all of the outstanding Prior Preferred Stock of any one series, such redemption shall be made pro rata, or the shares to be redeemed shall be chosen by lot, in such manner as the Board of Directors may determine.

At any time after notice of redemption has been given in the manner herein prescribed, or after the Corporation shall have delivered to any bank or trust company having its principal office in the Borough of Manhattan, City and State of New York, or in the City of Tulsa, State of Oklahoma, and having a capital, surplus and undivided profits of at least $5,000,000, an instrument in writing irrevocably authorizing such bank or trust company to give notice of redemption of all the outstanding Prior Preferred Stock of any one or more series in the name of the Corporation and in the manner herein prescribed, the Corporation may deposit the amount of the aggregate redemption price with any such bank or trust company named in such notice, in trust for the holders of the shares so to be redeemed, payable on the date fixed for redemption as aforesaid and in the amounts aforesaid to the respective order of such holders upon endorsement

to the Corporation or otherwise, as may be required, and upon surrender of the certificates for such shares. Upon deposit of the aggregate redemption price as aforesaid, or if no such deposit is made, upon said date fixed for redemption (unless the Corporation shall default in making payment of the redemption price as set forth in said notice) such holders shall cease to be stockholders with respect to said shares and shall be entitled only to such conversion or exchange rights (if any) on or before the date fixed for redemption as may be provided with respect to such shares or to receive the redemption price on the date fixed for redemption as aforesaid, from such bank or trust company or from the Corporation, without interest thereon, upon endorsement, if required, and the surrender of the certificate for such shares, as [91] aforesaid; provided that any funds so deposited by the Corporation and unclaimed at the end of 5 years from the date fixed for such redemption shall be repaid to the Corporation upon its request, after which repayment the holders of such shares so called for redemption shall look only to the corporation for payment of the redemption price thereof. Any funds so deposited which shall not be required for such redemption because of the exercisse, subsequent to the date of such deposit, of any right, conversion or otherwise, shall be returned to the Corporation forthwith. Any interest accrued on any funds so deposited shall belong to the Corporation and shall be paid to it from time to time.

Subject to the provisions hereof, the Board of Directors shall have authority to prescribe the manner in which Prior Preferred Stock shall be redeemed from time to time. No shares of Prior Preferred Stock which shall have been redeemed or which shall have been purchased by the application of capital or otherwise retired pursuant to the provisions of the General Corporation Law of the State of Delaware shall be reissued or resold.

4. Upon any dissolution, liquidation or winding up of the Corporation, the holders of Prior Preferred Stock of each series shall be entitled, before any distribution or payment is made to the holders of any class of stock ranking junior to the Prior Preferred Stock, to be paid in cash $100 per share, plus accrued dividends thereon to the date of payment, plus, if such dissolution, liquidation or winding up shall be voluntary, a premium, in the case of 1947 Prior Preferred Stock, in the amount fixed in Section 10 of this Article Fourth, and in the case of Prior Preferred Stock of any other series, in the amount, if any, fixed with respect to such series in accordance with Section 1 of this Article Fourth, and no more. In case the net assets of the Corporation are insufficient to pay the holders of all outstanding shares of Prior Preferred Stock of all series the full amounts to which they are respectively entitled, the entire net assets of the Corporation shall be distributed ratably to the holders of all outstanding shares of Prior Preferred Stock of all series in proportion to the amounts to which they are respectively entitled. The consolidation or

merger of the Corporation with or into another corporation, or the sale, lease or conveyance of all or substantially all of the assets of the Corporation as an entirety shall not be deemed a dissolution, liquidation or winding up of the Corporation for the purposes of this Section 4, and of Sections 14 and 21, of this Article Fourth.

5. Except as otherwise required by law and subject to the provisions of Section 6 of this Article Fourth, no holder of Prior Preferred Stock shall have any right to vote for the election of directors or for any other purpose; provided, however, that if and whenever dividends on any series of the Prior Preferred Stock shall be in arrears and such arrears shall aggregate an amount at least equal to 6 quarterly dividends upon such series, then and in such event and until such right shall cease as hereinafter provided, the holders of the outstanding Prior Preferred Stock shall be entitled, at all elections of directors, voting separately as a class, to elect 2 members of the Board of Directors; provided further, however, that in case a majority of the outstanding Prior Preferred Stock shall not be present in person or represented by proxy at any meeting at which the holders of the Prior Preferred Stock shall be entitled to vote for the election of directors, then the holders of the Prior Preferred Stock so present or represented shall be entitled, voting concurrently with the holders of the Common Stock and not as a separate class, to vote for the election of directors. Whenever all arrears of dividends on the Prior Preferred Stock shall have been

paid and dividends thereon for the current quarterly dividend period shall have been paid or declared and provided for, then the right of the holders of the Prior Preferred Stock to vote as provided in this Section 5 at all elections of directors shall cease, but subject always to the same provisions for the vesting of such voting rights in the case of any such future arrearages in dividends.

In any case in which the holders of the Prior Preferred Stock shall be entitled to vote pursuant to the provisions of this Section 5, or of Section 6, of this Article Fourth or pursuant to law, each holder of Prior Preferred Stock shall be entitled to one vote for each share thereof held.

6 (a). So long as any shares of Prior Preferred Stock are outstanding, the consent of the holders of at least two-thirds of the outstanding shares of Prior Preferred Stock, given in person or by proxy, either in writing or at a meeting called for that purpose, at which the holders of the Prior Preferred Stock shall vote separately as a class, shall be necessary for effecting or validating any one or more of the following:

(1) The authorization of any additional class of stock ranking prior to or on a parity with the Prior Preferred Stock, or the increase in the authorized amount of the Prior Preferred Stock or of any class of stock ranking prior to or on a parity with the Prior Preferred Stock, or the authorization or increase in the authorized amount of any class of stock

or obligation convertible into or evidencing the right to purchase any stock of any class ranking prior to or on a parity with the Prior Preferred Stock;

(2) The amendment, alteration or repeal of any of the provisions of the Certificate of Incorporation of the Corporation or any amendment thereto or any other certificate filed pursuant to law which would adversely affect any of the rights or preferences of outstanding shares of Prior Preferred Stock; provided, however, that if any such amendment, alteration or repeal would adversely affect the rights or preferences of outstanding shares of Prior Preferred Stock of any particular series without correspondingly affecting the rights or preferences of outstanding shares of all series, then like consent by the holders of at least two-thirds of the shares of Prior Preferred Stock of that particular series at the time outstanding shall also be necessary for effecting or validating any such amendment, alteration or repeal:

(3) The voluntary dissolution, liquidation or winding up of the Corporation, or the sale, lease or conveyance by the Corporation (except to a Wholly-Owned Subsidiary) of all or substantially all of its property or business;

(4) The merger or consolidation of the Corporation with or into any other corporation unless (A) the corporation resulting from or surviving such merger or consolidation will have

after such merger or consolidation no class of stock and no other securities, either authorized or outstanding, ranking prior to or on a parity with the Prior Preferred Stock (or the stock, if any, issued to holders of Prior Preferred Stock in lieu thereof in connection with such merger or consolidation) except the same number of shares of stock and the same amount of other securities with the same rights and prefences as the stock and securities of the Corporation, respectively, authorized and outstanding immediately preceding such merger or consolidation, and (B) each holder of Prior Preferred Stock immediately preceding such merger or consolidation shall receive in connection with such merger or consolidation the same number of shares, with the same rights and preferences, of the resulting or surviving corporation;

(5) The sale, lease or conveyance by any Subsidiary (except to the Corporation or a Wholly-Owned Subsidiary) of all or substantially all of its property or business;

(6) The merger or consolidation of any Subsidiary with or into any other corporation except the Corporation or a Wholly-Owned Subsidiary;

(7) The giving by the Corporation or any Subsidiary of any guaranty or similar obligation for the payment of any indebtedness of any other corporation or person or persons or for the payment of any amounts with respect to

the stock of any other corporation; provided, however, that this provision shall not prevent the Corporation of any Subsidiary, without such consent, from (A) guaranteeing the performance of any contract, or the payment of any obligation, of a Subsidiary, or (B) guaranteeing customers' notes and trade acceptances received by the Corporation or any Subsidiary in the ordinary and regular course of its business, or (C) extending, renewing or refunding any such guaranty or similar obligation;

(8) The issue of sale (except to the Corporation or a Wholly-Owned Subsidiary) by any Subsidiary of any common stock of such Subsidiary; provided, however, that this provision shall not prevent, without such consent, the issue or sale by a Subsidiary, which is not a Wholly-Owned Subsidiary, of common stock to others than the Corporation if, simultaneously with such issue or sale, there is issued or sold to the Corporation or one or more Wholly-Owned Subsidiaries common [92] stock in an amount sufficient to maintain the proportionate equity interest and voting control of the Corporation and its Wholly-Owned Subsidiaries in the Subsidiary so issuing or selling such stock; or

(9) The sale or other disposal by the Corporation of any Subsidiary (except to the Corporation or a Wholly-Owned Subsidiary) of any obligation or stock of any other Subsidiary

unless prior thereto or at the same time all of the obligations and stock of such other Subsidiary owned directly or indirectly by the Corporation and its Subsidiaries are sold or disposed of as an entirety for a consideration which shall not include capital stock of another corporation and which shall not include obligations of another corporation unless the shares of stock and obligations so sold or disposed of shall be validly pledged, free and clear of all other liens, charges or encumbrances, as security for such obligations.

(b) So long as any shares of Prior Preferred Stock are outstanding and unless

(I) Consolidated Net Income for any 12 consecutive calendar months out of the 15 calendar months next preceding the date of the proposed transaction for the purpose of which the calculation is made and the annual average of Consolidated Net Income for the 2 completed fiscal years next preceding the date of such transaction, Consolidated Net Income being increased in each case by an amount equal to the amount of interest on Funded Debt deducted in determining such Consolidated Net Income, shall each have been at least equal to 250% of the sum of (i) the total annual interest requirements on all Consolidated Funded Debt to be outstanding after giving effect to such transaction, plus (ii) the total annual dividend requirements on all shares of

Prior Preferred Stock and on all shares of all other classes of stock of the Corporation ranking prior to or on a parity with the Prior Preferred Stock and on all shares of all classes of stock of Subsidiaries not owned by the Corporation or any Wholly-Owned Subsidiary, ranking prior to the common stocks of such subsidiaries, which shares are to be outstanding after giving effect to such transaction, and

(II) Consolidated Net Tangible Assets as of any date not more than 90 days preceding the date of the proposed transaction for the purpose of which the calculation is made (adjusted, however, to give effect to such proposed transaction and the net proceeds received or the net expenditures incurred, as the case may be, by the Corporation and its Subsidiaries from the issuance, sale, acquisition or redemption of, or other dealings in, securities of the Corporation and its Subsidiaries after the date as of which Consolidated Net Tangible Assets were calculated but on or prior to the date of such proposed transaction) shall be at least equal to 150% of the sum of (i) Consolidated Funded Debt to be outstanding after giving effect to such transaction, plus (ii) the involuntary liquidation price of all outstanding shares of Prior Preferred Stock and of all other classes of stock of the Corporation ranking prior to or on a parity with the Prior Preferred Stock and of all shares of all classes of stock of Subsidiaries, not owned by the Corporation or any

Wholly-Owned Subsidiary, ranking prior to the common stocks of such Subsidiaries, which shares are to be outstanding after giving effect to such transaction, plus (iii) the capital and surplus applicable to all shares of common stocks of Subsidiaries, not owned by the Corporation or any Wholly-Owned Subsidiary, which are to be outstanding after giving effect to such transaction, such capital and surplus being as shown by the books of such Subsidiaries.

the consent of the holders of at least two-thirds of the outstanding shares of Prior Preferred Stock, given in person or by proxy, either in writing or at a meeting called for that purpose, at which the holders of the Prior Preferred Stock shall vote separately as a class, shall be necessary for effecting or validating any one or more of the following:

(1) The creation, issuance, sale or assumption by the Corporation of any Subsidiary of any Funded Debt; provided, however, that this provision shall not prevent, without such consent (A) the creation, issue and sale by the Corporation of an aggregate of not exceeding $25,000,000 principal amount of unsecured debentures and/or notes on or about the effective date of the Agreement of Merger setting forth this Article Fourth or (B) the creation, issuance, sale or assumption by the Corporation of any Subsidiary of any Funded Debt for the purpose of extending, renewing or refunding

at least an approximately equal aggregate principal amount of Funded Debt of the Corporation or such Subsidiary, or (C) the creation by any Subsidiary of any Funded Debt for issuance to, and the issuance and sale thereof to, the Corporation or a Wholly-Owned Subsidiary, or the extending, renewing or refunding of any such Funded Debt, or (D) the creation by the Corporation of any Subsidiary of Funded Debt secured by purchase money mortgages or other purchase money liens on property which subsequent to the effective date of the Agreement of Merger setting forth this Article Fourth may be acquired by by the Corporation or any Subsidiary, or the assumption by the Corporation or any Subsidiary of Funded Debt secured by mortgages or other liens existing on such property at the time of acquisition, provided that such Funded Debt shall not exceed two-thirds of the cost or fair market value (as determined in good faith by the Board of Directors of the Corporation) of such property at the time of acquisition, whichever is less, or the extending, renewing or refunding of any such Funded Debt, mortgage or other lien;

(2) The issuance by the Corporation of any authorized Prior Preferred Stock in excess of the number of shares initially issued pursuant to the provisions of Article IV of the Agreement of Merger setting forth this Article

Fourth or of any shares of any class of stock ranking prior to or on a parity with the Prior Preferred Stock or of any class of stock or obligation convertible into or evidencing the right to purchase any stock of any class ranking prior to or on a parity with the Prior Preferred Stock; or

(3) The issuance by any Subsidiary (except to the Corporation or a Wholly-Owned Subsidiary) of any shares of any class of stock of such Subsidiary ranking prior to the common stock of such Subsidiary.

7. (a) In no event, so long as any of the Prior Preferred Stock shall be outstanding, shall any dividend whatsoever, whether in cash, stock or otherwise, be declared or paid, or any distribution be made, on any stock of the Corporation of a class ranking junior to the Prior Preferred Stock, nor shall any shares of any such junior class of stock be purchased by the Corporation or by a Subsidiary or be redeemed by the Corporation, nor shall any moneys be paid to or set aside or made available for a purchase fund or sinking fund for the purchase or redemption of any shares of any such junior class of stock, unless

(1) all dividends on all outstanding shares of Prior Preferred Stock of all series for all past dividend periods shall have been paid and the full dividends for the then current quarterly dividend period shall have been paid or declared and provided for, and

(2) the Corporation shall have paid or set aside all amounts, if any, theretofore required to be paid or set aside as and for all purchase funds and sinking funds, if any, for the shares of Prior Preferred Stock of all series for the then current fiscal year, and all defaults, if any, in complying with any such purchase fund and sinking fund requirements in respect of previous fiscal years shall have been made good.

(b) In no event, so long as any Prior Preferred Stock shall be outstanding, shall any dividend, other than a dividend payable in stock of the Corporation of a class ranking junior to the Prior Preferred Stock, be declared or paid, or any distribution be made, on any such junior class of stock, nor shall any shares of any such junior class of stock be purchased by the Corporation or by a Subsidiary or be redeemed by the Corporation, nor shall any moneys be paid to or set aside or made available for a purchase fund or sinking fund for the purchase or redemption of any shares of any such junior class of stock, except to the extent that the sum of

(1) Consolidated Net Income subsequent to December 31, 1946, plus

(2) $5,000,000, plus

(3) the aggregate net proceeds received by the Corporation from the issue and sale on or subsequent to the effective date of the Agreement of Merger setting forth this Article Fourth of shares of stock of the Corporation

of any class ranking junior to the Prior Preferred Stock, which [93] net proceeds, to the extent that any thereof consists of property, rather than cash, shall be taken at the fair value of such property as determined by the Board of Directors of the Corporation, plus

(4) the aggregate net proceeds received by the Corporation from the issue and sale of any Funded Debt or any shares of Prior Preferred Stock or stock of any class ranking prior to or on a parity with the Prior Preferred Stock, which subsequent to the effective date of the Agreement of Merger setting forth this Article Fourth may have been converted into shares of stock of the Corporation of any class ranking junior to the Prior Preferred Stock, which net proceeds, to the extent that any thereof consists of property, rather than cash, shall be taken at the fair value of such property as determined by the Board of Directors of the Corporation.

shall exceed the sum of

(1) the aggregate amount of dividends (except dividends payable in shares of stock of the Corporation of a class ranking junior to the Prior Preferred Stock) paid or declared and distributions (not including amounts applied to the purchase or redemption of shares of any stock) made by the Corporation subsequent to December 31, 1946, plus

(2) the aggregate amount expended by the Corporation and its Subsidiaries subsequent to the effective date of the Agreement of Merger setting forth this Article Fourth for the purpose of acquiring or redeeming shares of stock of the Corporation of any class ranking junior to the Prior Preferred Stock.

8. Any purchase fund or sinking fund provided for the purchase or redemption of Prior Preferred Stock of any series (other than 1947 Prior Preferred Stock) may provide for the purchase or redemption of stock of such series and of any other series of Prior Preferred Stock created thereafter.

No shares of prior Preferred Stock which shall have been purchased or redeemed through operation of any purchase fund or sinking fund, or for which credit against any purchase fund or sinking fund requirement shall have been taken, shall be applied against any subsequent purchase fund or sinking fund requirement or reissued or resold.

9. In case Prior Preferred Stock of any series shall be convertible into or exchangeable for stock of any other series or class or other securities, no shares of Prior Preferred Stock of such series which shall have been so converted or exchanged shall be reissued or resold.

10. The 1947 Prior Preferred Stock shall be entitled:

(a) To receive dividends at the rate of 4½% of the par value thereof per annum, which dividends shall be cumulative, with re-

spect to shares issued on the effective date of the Agreement of Merger setting forth this Article Fourth, from the day on which such shares are issued, and with respect to shares issued after such date, from the first day of the quarterly dividend period within which such shares are issued;

(b) To receive upon the redemption thereof a premium, over and above $100 per share and any accrued dividends thereon, of $4 per share if redeemed prior to January 1, 1950; $3 per share if redeemed on or after January 1, 1950, but prior to January 1, 1952; $2 per share if redeemed on or after January 1, 1952, but prior to January 1, 1954; and $1 per share if redeemed on or after January 1, 1954, but prior to January 1, 1956; but to receive no premium if redeemed on or after January 1, 1956, or if redeemed through the operation of the sinking fund provided for in paragraph (d) of this Section 10;

(c) To receive upon the voluntary dissolution, liquidation or winding up of the Corporation, a premium, over and above $100 per share and any accrued dividends thereon, in the amount per share as the premium which the shares of such series would be entitled to receive pursuant to the provisions of paragraph (b) of this Section 10 if, on the date of payment, such shares were being redeemed pursuant to the provisions of Section 3 of this Article Fourth;

(d) To the benefit of a sinking fund as and for which the Corporation, so long as any shares of 1947 Prior Preferred Stock shall be outstanding, shall set aside in cash on July 1, 1948, and on each January 1 and July 1 thereafter, an amount equal to $100 multiplied by 1½% of the greatest number of shares of 1947 Prior Preferred Stock at any one time theretofore outstanding, less an amount equal to $100 per share for such number of shares of 1947 Prior Preferred Stock as the Corporation may credit against any such sinking fund requirement out of any shares purchased or redeemed by it (other than shares purchased or redeemed through the operation of the sinking fund and other than fractions of shares in respect of which the Corporation shall have paid cash under the provisions of subdivision (e) of Article IV of the Agreement of Merger setting forth this Article Fourth), at any time prior to the setting aside of such sinking fund requirement and for which credit shall not theretofore have been taken against any such sinking fund requirement.

At any time or times after any January 1 or July 1 and prior to the next May 1 or November 1, as the case may be, the Corporation may apply any cash then in the sinking fund to the purchase of shares of 1947 Prior Preferred Stock, if obtainable, at a price or prices not exceeding $100 per share plus accrued dividends to the date of purchase. Such pur-

chases may be made at public or private sale, with or without advertisement, in such manner, from such person or persons, and at such price or prices (subject to the provisions of the preceding sentence) as the Corporation in its discretion may determine.

If, on any May 1 or November 1 the unexpended balance of cash in the sinking fund shall exceed $10,000, such balance, to the extent necessary substantially to exhaust the same, shall be applied to the redemption of shares of 1947 Prior Preferred Stock on or before the dividend payment date next following such May 1 or November 1, as the case may be (provided, however, that if such balance shall not exceed $10,000 the Corporation may, but shall not be required to, make such redemption) in the manner prescribed by Section 3 of this Article Fourth at the redemption price specified in paragraph (b) of this Section 10 in respect of shares redeemed through the operation of the sinking fund. Any amount of such balance not so applied to such redemption shall be retained in the sinking fund and shall be applied with subsequent sinking fund instalments to the purchase of redemption of 1947 Prior Preferred Stock as above provided.

Accrued dividends on shares of 1947 Prior Preferred Stock purchased or redeemed through the operation of the sinking fund shall be paid by the Corporation out of its general funds.

Second Preferred Stock

11. The Second Preferred Stock may be issued from time to time in one or more series. The designations, preferences and relative, participating, optional and other special rights of each such series and the qualifications, limitations or restrictions thereof may differ from those of any and all other series already outstanding, and the Board of Directors of the Corporation is hereby expressly granted authority, subject to the provisions hereof, to fix, by resolution or resolutions adopted prior to the issuance of any shares of a particular series of Second Preferred Stock, the designations, preferences and relative, participating, optional and other special rights of such series, and the qualifications, limitations or restrictions thereof, in any or all of the following, but in no other respects:

(a) the number of shares to constitute such series and the designation of such series;

(b) the rate of dividends (not exceeding 7% per annum) which the shares of such series shall be entitled to receive and the date or dates from which dividends thereon shall be cumulative;

(c) the amount of the premium, if any (not exceeding $10 per share), over and above $100 per share and any accrued dividends thereon which the shares of such series shall be entitled to receive upon the redemption thereof;

(d) the amount of the premium, if any (not exceeding $10 per share), over and above $100 per share and any accrued dividends thereon which the shares of such series shall be entitled to receive upon the voluntary dissolution, liquidation or winding up of the Corporation;

(e) the right, if any, of holders of shares of such series to convert the same into or exchange the same for stock of any other series or class or other securities and the terms and conditions of such conversion or exchange; and

(f) the terms of any purchase fund or sinking fund for the purchase or redemption of shares of such series.

All shares of Second Preferred Stock of the same series shall be identical in all respects, except, if so provided, as to the dates from which dividends become cumulative, and all shares of Second Preferred Stock of all series shall be of equal rank and shall be identical in all respects except as permitted by the foregoing provisions of this Section 11.

12. Subject to the prior rights of the Prior Preferred Stock and to the limitations set forth in Section 7 of this Article Fourth, the holders of Second Preferred Stock of each series shall be entitled to receive, and the Corporation shall be bound to pay, only as and when declared by the Board of Directors and out of funds legally available for the payment of dividends, cumulative divi-

dends at the annual rate fixed with respect to such series in accordance with Section 11 of this Article Fourth hereof, and no more, payable in cash, quarterly, on the first days of January, April, July and October in each year. In case Second Preferred Stock of more than one series is outstanding, the Corporation, in making any dividend payment upon the Second Preferred Stock, shall make dividend payments ratably upon all outstanding shares of Second Preferred Stock of all series in proportion to the amount of dividends accrued thereon to the date of such dividend payment. If dividends on any shares of Second Preferred Stock shall be in arrears, the holders thereof shall not be entitled to any interest, or sum of money in lieu of interest, thereon.

13. Subject to the limitations set forth in Section 7 of this Article Fourth, the Corporation at the option of the Board of Directors, may redeem at any time, or from time to time, any series of Second Preferred Stock or any part of any series, at $100 per share, plus accrued dividends thereon to the date fixed for redemption, plus a premium in the amount, if any, fixed with respect to such series in accordance with Section 11 of this Article Fourth (the total amount per share so payable upon any redemption of Second Preferred Stock being herein referred to as the "redemption price"); provided, however, that not less than 30 days previous to the date fixed for redemption a notice of the time and place thereof shall be given

to the holders of record of the shares of Second Preferred Stock so to be redeemed, by mailing a copy of such notice to such holders at their respective addresses as the same appear upon the books of the Corporation. In case of redemption of less than all of the outstanding Second Preferred Stock of any one series, such redemption shall be made pro rata, or the shares to be redeemed shall be chosen by lot, in such manner as the Board of Directors may determine.

At any time after notice of redemption has been given in the manner herein prescribed, or after the Corporation shall have delivered to any bank or trust company having its principal office in the Borough of Manhattan, City and State of New York, or in the City of Tulsa, State of Oklahoma, and having a capital, surplus and undivided profits of at least $5,000,000, an instrument in writing irrevocably authorizing such bank or trust company to give notice of redemption of all the outstanding Second Preferred Stock of any one or more series in the name of the Corporation and in the manner herein prescribed, the Corporation may deposit the amount of the aggregate redemption price with any such bank or trust company named in such notice, in trust for the holders of the shares so to be redeemed, payable on the date fixed for redemption as aforesaid and in the amounts aforesaid to the respective order of such holders upon endorsement to the Corporation or otherwise, as may be required, and upon surrender of the certificates for such shares. Upon deposit of the

aggregate redemption price as aforesaid, or if no such deposit is made, upon said date fixed for redemption (unless the Corporation shall default in making payment of the redemption price as set forth in said notice) such holders shall cease to be stockholders with respect to said shares and shall be entitled only to such conversion or exchange rights (if any) on or before the date fixed for redemption as may be provided with respect to such shares or to receive the redemption price on the date fixed for redemption as aforesaid, from such bank or trust company or from the Corporation, without interest thereon, upon endorsement, if required, and the surrender of the certificates for such shares, as aforesaid; provided that any funds so deposited by the Corporation and unclaimed at the end of 6 years from the date fixed for such redemption shall be repaid to the Corporation upon its request, after which repayment the holders of such shares so called for redemption shall look only to the Corporation for payment of the redemption price thereof. Any funds so deposited which shall not be required for such redemption because of the exercise, subsequent to the date of such deposit, of any right, conversion or otherwise, shall be returned to the Corporation forthwith. Any interest accrued on any funds so deposited shall belong to the Corporation and shall be paid to it from time to time.

Subject to the provisions hereof, the Board of Directors shall have authority to prescribe the manner in which Second Preferred Stock shall be

redeemed from time to time. No shares of Second Preferred Stock which shall have been redeemed or which shall have been purchased by the application of capital or otherwise retired pursuant to the provisions of the General Corporation Law of the State of Delaware shall reissued or resold.

14. Upon any dissolution, liquidation or winding up of the Corporation, subject to the prior rights of the Prior Preferred Stock, the holders of Second Preferred Stock of each series shall be entitled, before any distribution or payment is made to the holders of any class of stock ranking junior to the Second Preferred Stock, to be paid in cash $100 per share, plus accrued dividends thereon to the date of payment, plus, if dissolution, liquidation or winding up shall be voluntary, a premium in the amount, if any, fixed with respect to such series in accordance with Section 11 of this Article Fourth, and no more. In case the net assets of the Corporation remaining after the holders of the Prior Preferred Stock shall have been paid the full amounts to which they are entitled are insufficient to pay the holders of all outstanding shares of Second Preferred Stock of all series the full amounts to which they are respectively entitled, all of such remaining net assets shall be distributed ratably to the holders of all outstanding shares of Second Preferred Stock of all series in proportion to the amounts to which they are respectively entitled.

15. Except as otherwise required by law and subject to the provisions of Section 16 of this

Article Fourth, no holder of Second Preferred Stock shall have any right to vote for the election of directors or for any other purpose; provided, however, that if and whenever dividends on any series of the Second Preferred Stock shall be in arrears and such arrears shall aggregate an amount at least equal to 6 quarterly dividends upon such series, then and in such event and until such right shall cease as hereinafter provided, the holders of the outstanding Second Preferred Stock shall be entitled, at all elections of directors, voting separately as a class, to elect 2 members of the Board of Directors; provided further, however, that in case a majority of the outstanding Second Preferred Stock shall not be present in person or represented by proxy at any meeting at which the holders of the Second Preferred Stock shall be entitled to vote for the election of directors, then the holders of the Second Preferred Stock so present or represented shall be entitled, voting concurrently with the holders of the Common Stock and not a separate class, to vote for the election of directors. Whenever all arrears of dividends on the Second Preferred Stock shall have been paid and dividends thereon for the current quarterly dividend period shall have been paid or declared and provided for, then the right of the holders of the Second Preferred Stock to vote as provided in this Section 15 at all elections of directors shall cease, but subject always to the same provisions for the vesting of such voting rights in the case of any such future arrearages in dividends.

In any case in which the holders of the Second Preferred Stock shall be entitled to vote pursuant to the provisions of this Section 15, or of Section 16, of this Article Fourth or pursuant to law, each holder of Second Preferred Stock shall be entitled to one vote for each share thereof held.

16 (a). So long as any shares of Second Preferred Stock are outstanding, the consent of the holders of at least a majority of the outstanding shares of Second Preferred Stock, given in person or by proxy, either in writing or at a meeting called for that purpose, at which the holders [95] of the Second Preferred Stock shall vote separately as a class, shall be necessary for effecting or validating any one or more of the following:

(1) The authorization of any additional class of stock ranking prior to or on a parity with the Second Preferred Stock, or the increase in the authorized amount of the Second Preferred Stock or of any class of stock ranking prior to or on a parity with the Second Preferred Stock, or the authorization or increase in the authorized amount of any class of stock or obligation convertible into or evidencing the right to purchase any stock of any class ranking prior to or on a parity with the Second Preferred Stock;

(2) The amendment, alteration or repeal of any of the provisions of the Certificate of Incorporation of the Corporation or any amendment thereto or any other certificate filed pursuant to law which would adversely affect

any of the rights or preferences of outstanding shares of Second Preferred Stock; provided, however, that if any such amendment, alteration or repeal would adversely affect the rights or preferences of outstanding shares of Second Preferred Stock of any particular series without correspondingly affecting the rights or preferences of outstanding shares of all series, then like consent by the holders of at least a majority of the shares of Second Preferred Stock of that particular series at the time outstanding shall also be necessary for effecting or validating any such amendment, alteration or repeal;

(3) The voluntary dissolution, liquidation or winding up of the Corporation, or the sale, lease or conveyance by the Corporation (except to a Wholly-Owned Subsidiary) of all or substantially all of its property or business;

(4) The merger or consolidation of the Corporation with or into any other corporation unless (A) the corporation resulting from or surviving such merger or consolidation will have after such merger or consolidation no class of stock and no other securities, either authorized or outstanding, ranking prior to or on a parity with the Second Preferred Stock (or the stock, if any, issued to holders of **Second Preferred** Stock in lieu thereof in connection with such merger or consolidation) except the same number of shares of stock and

the same amount of other securities with the same rights and preferences as the stock and securities of the Corporation, respectively, authorized and outstanding immediately preceding such merger or consolidation, and (B) each holder of Second Preferred Stock immediately preceding such merger or consolidation shall receive in connection with such merger or consolidation the same number of shares, with the same rights and preferences, of the resulting or surviving corporation;

(5) The sale, lease or conveyance by any Subsidiary (except to the Corporation or a Wholly-Owned Subsidiary) of all or substantially all of its property or business;

(6) The merger or consolidation of any Subsidiary with or into any other corporation except the Corporation or a Wholly-Owned Subsidiary;

(7) The giving by the Corporation or any Subsidiary of any guaranty or similar obligation for the payment of any indebtedness of any other corporation or person or persons or for the payment of any amounts with respect to the stock of any other corporation; provided, however, that this provision shall not prevent the Corporation or any Subsidiary, without such consent from (A) guaranteeing the performance of any contract, or the payment of any obligation, of a Subsidiary, or (B) guaranteeing customers' notes and trade acceptances received by the Corporation or any Sub-

sidiary in the ordinary and regular course of its business, or (C) extending, renewing or refunding any such guaranty or similar obligation;

(8) The issue or sale (except to the Corporation or a Wholly-Owned Subsidiary) by any Subsidiary of any common stock of such Subsidiary; provided, however, that this provision shall not prevent, without such consent, the issue or sale by a Subsidiary, which is not a Wholly-Owned Subsidiary, of common stock to others than the Corporation if, simultaneously with such issue or sale, there is issued or sold to the Corporation or one or more Wholly-Owned Subsidiaries common stock in an amount sufficient to maintain the proportionate equity interest and voting control of the Corporation and its Wholly-Owned Subsidiaries in the Subsidiary so issuing or selling such stock; or

(9) The sale or other disposal by the Corporation or any Subsidiary (except to the Corporation or a Wholly-Owned Subsidiary) of any obligation or stock of any other Subsidiary unless prior thereto or at the same time all of the obligations and stock of such other Subsidiary owned directly or indirectly by the Corporation and its Subsidiaries are sold or disposed of as an entirety for a consideration which shall not include capital stock of another corporation and which shall not include obligations of another corporation unless the shares of stock and obligations so sold or disposed of

shall be validly pledged, free and clear of all other liens, charges or encumbrances, as security for such obligations.

(b) So long as any shares of Second Preferred Stock are outstanding and unless

(I) Consolidated Net Income for any 12 consecutive calendar months out of the 15 calendar months next preceding the date of the proposed transaction for the purpose of which the calculation is made and the annual average of Consolidated Net Income for the 2 completed fiscal years next preceding the date of such transaction, Consolidated Net Income being increased in each case by an amount equal to the amount of interest on Fundred Debt deducted in determining such Consolidated Net Income, shall each have been at least equal to 200% of the sum of (i) the total annual interest requirements on all Consolidated Funded Debt to be outstanding after giving effect to such transaction, plus (ii) the total annual dividend requirements on all shares of Second Preferred Stock and on all shares of all other classes of stock of the Corporation ranking prior to or on a parity with the Second Preferred Stock and on all shares of all classes of stock of Subsidiaries, not owned by the Corporation or any Wholly-Owned Subsidiary, ranking prior to the common stocks of such Subsidiaries, which shares are to be outstanding after giving effect to such transaction, and

(II) Consolidated Net Tangible Assets as of any date not more than 90 days preceding the date of the proposed transaction for the purpose of which the calculation is made (adjusted, however, to give effect to such proposed transaction and the net proceeds received or the net expenditures incurred, as the case may be, by the Corporation and its Subsidiaries from the issuance, sale, acquisition or redemption of, or other dealings in, securities of the Corporation and its Subsidiaries after the date as of which Consolidated Net Tangible Assets were calculated but on or prior to the date of such proposed transaction) shall be at least equal to 133% of the sum of (i) Consolidated Funded Debt to be outstanding after giving effect to such transaction, plus (ii) the involuntary liquidation price of all outstanding shares of Second Preferred Stock and of all other classes of stock of the Corporation ranking prior to or on a parity with the Second Preferred Stock and of all shares of all classes of stock of Subsidiaries, not owned by the Corporation or any Wholly-Owned Subsidiary, ranking prior to the common stocks of such Subsidiaries, which shares are to be outstanding after giving effect to such transaction, plus (iii) the capital and stocks of Subsidiaries, not owned by the Corporation or any Wholly-Owned Subsidiary, which are to be outstanding after giving effect to such transaction, such capital and surplus being as shown by the books of such Subsidiaries,

surplus applicable to all shares of common the consent of the holders of at least a majority of the outstanding shares of Second Preferred Stock, given in person or by proxy, either in writing or at a meeting called for that purpose, at which the holders of the Second Preferred Stock shall vote separately as a class, shall necessary for effecting or validating any one or more of the following:

(1) The creation, issuance, sale or assumption by the Corporation or any Subsidiary of any Funded Debt; provided, however, that this provision shall not prevent, without such consent (A) the creation, issue and sale by the Corporation of an aggregate of not exceeding $25,000,000 principal amount of unsecured debentures and/or notes on or about the effective date of the Agreement of Merger setting forth this Article Fourth, or (B) the creation, issuance, sale or [96] assumption by the Corporation or any Subsidiary of any Funded Debt for the purpose of extending renewing or refunding at least an approximately equal aggregate principal amount of Funded Debt of the Corporation or such Subsidiary, or (C) the creation by any Subsidiary of any Funded Debt for issuance to, and the issuance and sale thereof to the Corporation or a Wholly-Owned Subsidiary, or the extending, renewing or refunding of any such Funded Debt, or (D) the creation by the Corporation or any Subsidiary of any Funded Debt secured by purchase money

mortgages or other purchase money liens on property which subsequent to the effective date of the Agreement of Merger setting forth this Article Fourth, may be acquired by the Corporation or any Subsidiary, or the assumption by the Corporation or any Subsidiary of Funded Debt secured by mortgages or other liens existing on such property at the time of acquisition, provided that such Funded Debt shall not exceed two-thirds of the cost or fair market value (as determined in good faith by the Board of Directors of the Corporation) of such property at the time of acquisition, whichever is less, or the extending, renewing or refunding of any such Funded Debt, mortgage or other lien;

(2) The issuance by the Corporation of any authorized Second Preferred Stock in excess of the number of shares issued on the day of the effective date of the Agreement of Merger setting forth this Article Fourth or of any shares of any class of stock ranking prior to or on a parity with the Second Preferred Stock or of any class of stock or obligation convertible into or evidencing the right to purchase any stock of any class ranking prior to or on a parity with the Second Preferred Stock; or

(3) The issuance by any Subsidiary (except to the Corporation or a Wholly-Owned Subsidiary) of any shares of any class of stock of such Subsidiary ranking prior to the common stock of such Subsidiary.

17. (a) In no event, so long as any of the Second Preferred Stock shall be outstanding, shall any dividend whatsoever, whether in cash, stock or otherwise, be declared or paid, or any distribution be made, on any stock of the Corporation of a class ranking junior to the Second Preferred Stock, nor shall any shares of any such junior class of stock be purchased by the Corporation or by a Subsidiary or be redeemed by the Corporation, nor shall any moneys be paid to or set aside or made available for a purchase fund or sinking fund for the purchase or redemption of any shares of any such junior class of stock, unless

(1) all dividends on all outstanding shares of Second Preferred Stock of all series for all past dividend periods shall have been paid and the full dividends for the then current quarterly dividend period shall have been paid or declared and provided for, and

(2) the Corporation shall have paid or set aside all amounts, if any, theretofore required to be paid or set aside as and for all purchase funds and sinking funds, if any, for the shares of Second Preferred Stock of all series for the then current fiscal year, and all defaults, if any, in complying with any such purchase fund and sinking fund requirements in respect of previous fiscal years shall have been made good.

(b) In no event, so long as any Second Preferred Stock shall be outstanding, shall any dividend, other

than a dividend payable in stock of the Corporation of a class ranking junior to the Second Preferred Stock, be declared or paid, or any distribution be made, on any such junior class of stock, nor shall any shares of any such junior class of stock be purchased by the Corporation or by a Subsidiary or be redeemed by the Corporation, nor shall any moneys be paid to or set aside or made available for a purchase fund or sinking fund for the purchase or redemption of any shares of any such junior class of stock, except to the extent that the sum of

(1) Consolidated Net Income subsequent to December 31, 1946, plus

(2) $5,000,000, plus

(3) the aggregate net proceeds received by the Corporation from the issue and sale on or subsequent to the effective date of the Agreement of Merger setting forth this Article Fourth of shares of stock of the Corporation of any class ranking junior to the Second Preferred Stock, which net proceeds, to the extent that any thereof consist of property, rather than cash, shall be taken at the fair value of such property as determined by the Board of Directors of the Corporation, plus

(4) the aggregate net proceeds received by the Corporation from the issue and sale of any Funded Debt or any shares of Second Preferred Stock or stock of any class ranking prior to or on a parity with the Second Preferred Stock, which subsequent to the effective

date of the Agreement of Merger setting forth this Article Fourth may have been converted into shares of stock of the Corporation of any class ranking junior to the Second Preferred Stock, which net proceeds, to the extent that any thereof consist of property, rather than cash, shall be taken at the fail value of such property as determined by the Board of Directors of the Corporation,

shall exceed the sum of

(1) the aggregate amount of dividends (except dividends payable in shares of stock of the Corporation of a class ranking junior to the Second Preferred Stock) paid or declared and distributions (not including amounts applied to the purchase or redemption of shares of any stock) made by the Corporation subsequent to December 31, 1946, plus

(2) the aggregate amount expended by the Corporation and its Subsidiaries subsequent to the effective date of the Agreement of Merger setting forth this Article Fourth for the purpose of acquiring or redeeming shares of stock of the Corporation of any class ranking junior to the Second Preferred Stock.

18. Any purchase fund or sinking fund provided for the purchase or redemption of Second Preferred Stock of any series may provide for the purchase or redemption of stock of such series and of any other series of Second Preferred Stock created thereafter.

No shares of Second Preferred Stock which shall have been purchased or redeemed through the operation of any purchase fund or sinking fund, or for which credit against any purchase fund or sinking fund requirement shall have been taken, shall be applied against any subsequent purchase fund or sinking fund requirement or reissued or resold.

19. In case Second Preferred Stock of any series shall be convertible into or exchangeable for stock of any other series or class or other securities, no shares of Second Preferred Stock of such series which shall have been so converted or exchanged shall be reissued or resold.

Common Stock

20. Subject to the prior rights of the Prior Preferred Stock and the Second Preferred Stock and to the limitations set forth in Sections 7 and 17 of this Article Fourth, dividends may be paid upon the Common Stock as and when declared by the Board of Directors out of funds legally available for the payment of dividends.

21. Upon any dissolution, liquidation or winding up of the Corporation, whether voluntary or involuntary, after the holders of the Prior Preferred Stock and the Second Preferred Stock of each series shall have been paid the full amounts to which they are respectively entitled, the remaining net assets of the Corporation shall be distributed ratably to the holders of the Common Stock.

22. Except as otherwise expressly provided in Sections 5 and 6 of this Article Fourth with respect to the Prior Preferred Stock and in Sections 15 and 16 of this Article Fourth with respect to the Second Preferred Stock and except as otherwise may be required by law, the Common Stock shall have the exclusive right to vote for the election of directors and for all other purposes, each holder of Common Stock being entitled to one vote for each share thereof held. [97]

Definitions

23. For the purposes of this Article Fourth:

(a) The terms "accrued dividends," "dividends accrued," "dividends in arrears" and similar terms shall mean, in respect of each share of Prior Preferred Stock or Second Preferred Stock of any particular series, an amount equal to simple interest on the sum of $100 at an annual rate equal to the dividend rate fixed with respect to such series from the date on which dividends on such share became cumulative to the date on which dividends are stated to be accrued, less the aggregate amount of dividends paid thereon.

(b) The term "Consolidated Balance Sheet" shall mean a balance sheet consolidating the accounts of the Corporation and its Subsidiaries prepared in accordance with generally accepted principles of accounting.

(c) The term "Consolidated Current Liabilities" shall mean the aggregate of such of the following

as would appear on the liability side of a Consolidated Balance Sheet:

(1) any and all loans, accounts, bills, notes, acceptances, bonds, debentures or other obligations of any character payable on demand or maturing in twelve months or less than twelve months after the particular time as of which the calculation is made;

(2) dividends declared but not paid (other than dividends payable in shares of stock);

(3) the aggregate amount of all accrued salaries, wages, interests, rents, royalties and other expenses and all estimated and accrued taxes (including, but without limitation, income, capital stock and excess profits taxes);

(4) any reserves carried by the Corporation or its Subsidiaries for contingent current liabilities; and

(5) such other liabilities as may be properly included as "current" in accordance with generally accepted principles of accounting;

provided that no obligations of any character shall for any purpose be deemed to be part of Consolidated Current Liabilities if moneys sufficient to pay and discharge such liabilities in full (either on the date of maturity expressed therein or on such earlier date as such obligations may be redeemed pursuant to the provisions thereof) shall have been deposited with the proper depositary or with a trustee in trust for the payment thereof and such

moneys shall not be included on the asset side of such Consolidated Balance Sheet.

(d) The term "Consolidated Funded Debt" shall mean all Funded Debt which would appear on the liability side of a Consolidated Balance Sheet.

(e) The term "Consolidated Net Income" shall mean the balance remaining after deducting from the consolidated earnings and other income and profits of the Corporation and its Subsidiaries all expenses and charges of every proper character, including interest, amortization of debt discount and expense, taxes, reasonable provision for depreciation, amounts appropriated under any plan of the Corporation or any Subsidiary for extra compensation for, or pension of, officers and employees, provision for net profits applicable to minority interests in Subsidiaries and proper reserves determined in good faith by the Board of Directors of the Corporation in its discretion, all based upon a statement of income and profit and loss consolidating the accounts of the Corporation and its Subsidiaries prepared in accordance with generally accepted principle of accounting; provided, however, that for the purposes of clause I of paragraph (b) of Section 6, and clause I of paragraph (b) of Section 16, of this Article Fourth, the term "Consolidated Net Income" shall include (1) in the case of any corporation which shall have been merged into or consolidated with the Corporation or all or substantially all of the assets of which shall have been acquired by the Corporation during any period for which Consolidated Net Income is

being calculated, the net income of such Corporation, determined in accordance with the foregoing principles, for the portion of such period prior to the date of such merger, consolidation or acquisition; provided, however, that any net income of Transwestern Oil Company, which was merged into the Corporation on August 2, 1946, shall be reduced to eliminate direct net income from royalties and increased to reflect correspondingly lower income taxes, and (2) in the case of any corporation which shall have become a Subsidiary during any period for which Consolidated Net Income is being calculated, the net income of such corporation, determined in accordance with the foregoing principles, for the portion of such period prior to the date on which such corporation became a Subsidiary, adjusted to eliminate net income applicable to the stock of such corporation not owned by the Corporation and/or one or more Subsidiaries on the date of the proposed transaction for the purpose of which the calculation is made.

(f) The term "Consolidated Net Tangible Assets" shall mean the balance remaining after deducting Consolidated Current Liabilities from Consolidated Tangible Assets.

(g) The term "Consolidated Tangible Assets" shall mean the total of all assets appearing on a Consolidated Balance Sheet less the sum of

(1) the book amount of intangible assets such as good will, trademarks, brands, trade

names, patents and unamortized debt discount and expenses;

(2) any capital write-ups resulting from reappraisals (except pursuant to an appraisal as hereinafter permitted) of assets or investments subsequent to December 31, 1946, and to their acquisition by the Corporation;

(3) any reserves, other than general contingency reserves, carried by the Corporation or its Subsidiaries as non-current liabilities and not already deducted from assets; and

(4) the amount, if any, at which stock of the Corporation owned by the Corporation or by any Subsidiary appears upon the asset side of such Consolidated Balance Sheet;

provided, however, that in computing Consolidated Tangible Assets the Corporation may substitute for the aggregate of the valuations of producing oil and gas properties the fair value of such properties as determined by an appraisal thereof by such independent petroleum engineer or engineers or other independent expert or experts as the Board of Directors of the Corporation shall employ for the purpose.

(h) The term "Funded Debt" shall mean indebtedness maturing by its terms more than 12 months from the particular time as of which the calculation is made; provided, however, that for the purposes of proviso (B) of subdivision (1) of paragraph (b) of Section 6, and of proviso (B)

of subdivision (1) of paragraph (b) of Section 16, of this Article Fourth, the term "Funded Debt" as applied to indebtedness to be extended, renewed or refunded shall include indebtedness maturing by its terms more than 12 months from the date of creation thereof but which at the time of such extension, renewal or refunding matures within 12 months.

(i) The term "outstanding," when used in reference to shares of stock, shall mean issued shares, excluding shares held by the Corporation or a Subsidiary.

(j) The term "Subsidiary" shall mean any corporation of which the Corporation and/or one or more Subsidiaries own or control, directly or indirectly, more than 50% of the outstanding stock having by its terms ordinary voting power to elect a majority of the Board of Directors of such corporation, irrespective of whether or not at the time stock of any other class or classes of such corporation shall have or might have voting power by reason of the happening of any contingency.

(k) The term "Wholly-Owned Subsidiary" shall mean any Subsidiary all the shares of capital stock of which (other than qualifying shares required to be owned by directors under applicable law) shall at the time be owned or controlled, directly or indirectly, by the Corporation and/or one or more Wholly-Owned Subsidiaries and which has no Funded Debt other than (1) Funded Debt to the

Corporation or a Wholly-Owned Subsidiary and (2) indebtedness in respect [98] of purchase money mortgages or other liens of the nature referred to in proviso (D) of subdivision (1) of paragraph (b) of Section 6, and proviso (D) of subdivision (1) of paragraph (b) of Section 16, of this Article Fourth.

(l) The certificate of any firm of public accountants of recognized standing, selected by the Board of Directors, of which firm no director, officer or employee of the Corporation or of any Subsidiary is a partner, shall be conclusive evidence as to all matters embraced in the Consolidated Balance Sheet and as to the amount of Consolidated Current Liabilities, Consolidated Funded Debt, Consolidated Net Income, Consolidated Net Tangible Assets and Consolidated Tangible Assets.

(m) Any class or classes of stock of the Corporation shall be deemed to rank

(1) prior to the Prior Preferred Stock or the Second Preferred Stock, as the case may be, if the holders of such class or classes shall be entitled to the receipt of dividends or of amounts distributable upon any dissolution, liquidation or winding up, as the case may be, in preference to or with priority over the holders of the Prior Preferred Stock or the Second Preferred Stock, as the case may be;

(2) on a parity with the Prior Preferred Stock or the Second Preferred Stock, as the

case may be, whether or not the dividend rates, dividend payment dates or redemption or liquidation prices per share thereof be different from the Preferred Stock or the Second Preferred Stock, as the case may be, if the rights of holders of such class or classes to the receipt of dividends or of amounts distributable upon any dissolution, liquidation or winding up, as the case may be, shall be neither (a) in preference to or with priority over nor (b) subject or subordinate to the rights of the holders of the Prior Preferred Stock or the Second Preferred Stock, as the case may be, in respect of the receipt of dividends or of amounts distributable upon any dissolution, liquidation or winding up, as the case may be; and

(3) junior to the Prior Preferred Stock or the Second Preferred Stock, as the case may be, if the rights of the holders of such class or classes shall be subject or subordinate to the rights of the holders of the Prior Preferred Stock or the Second Preferred Stock, as the case may be, in respect of the receipt of dividends or of amounts distributable upon any dissolution, liquidation or winding up, as the case may be.

Fifth: The Corporation shall have perpetual existence.

Sixth: The private property of the stockholders of the Corporation shall not be subject to the payment of corporate debts to any extent whatsover.

Seventh: No stockholder of this Corporation shall have any preemptive or preferential right to purchase or subscribe for any stock or options or option warrants of the Corporation unissued, whether now or hereafter authorized, or acquired by the Corporation, or any bonds, notes, debentures or other obligations convertible into stock of the Corporation, nor any right of subscription to any such stock or options or option warrants, or any such bonds, notes, debentures or other obligations other than such, if any, as the Board of Directors in its discretion, from time to time, shall determine, and at such price as the Board of Directors shall fix, pursuant to the authority hereby conferred. The Board of Directors may cause to be issued the stock of the Corporation, or options, option warrants, bonds, notes, debentures, or other obligations convertible into stock, without offering such stock, options, option warrants or such bonds, notes, debentures, or other obligations, either in whole or in part, to the stockholders. The acceptance of stock of this Corporation, or dividends thereon, shall be a waiver of any preemptive or preferential right which, notwithstanding this provision, might otherwise be asserted by a stockholder of the Corporation.

Eighth: The Corporation shall be entitled to treat the person in whose name any share is registered as the owner thereof, for all purposes, and shall not be bound to recognize any equitable or other claims to, or interest in, such share on the

part of any other person, whether or not the Corporation shall have notice thereof, except as otherwise expressly provided by the statutes of the State of Delaware.

Ninth: The number of directors which shall constitute the whole Board of Directors of the Corporation shall be such as from time to time shall be fixed by, or in the manner provided in, the By-laws, but in no case shall the number be less than three. Vacancies in the Board of Directors, whether created by an increase in the number of directors or otherwise, shall be filled in the manner provided in the By-laws. The directors shall be stockholders of the Corporation.

Tenth: In furtherance and not in limitation of the powers conferred by statute, and in addition to the powers which may be conferred by the By-laws, the Board of Directors of the Corporation shall have the following powers:

1. To make, alter and amend the By-laws of the Corporation, but any by-law so made, altered or amended by the Board of Directors may be altered, amended or repealed by the stockholders.

2. From time to time to fix and determine and to vary the amount of the working capital of the Corporation, to direct and determine the use and disposition thereof, to set apart, out of any funds of the Corporation available for dividends, a reserve or reserves for any proper

purpose, and to abolish any such reserve in the manner in which it was created.

3. To designate by resolution or resolutions passed by a majority of the whole Board one or more committees, each committee to consist of two or more directors of the Corporation, which, to the extent provided in said resolution or resolutions or in the By-laws of the Corporation, shall have and may exercise the powers of the Board of Directors in the management of the business and affairs of the Corporation, and shall have power to authorize the seal of the Corporation to be affixed to all papers which may require it.

4. To determine from time to time whether and to what extent and at what times and places and under what conditions and regulations the accounts, books, papers and records of the Corporation, or any of them, shall be open to the inspection of stockholders; and no stockholder shall have any right to inspect any account, book, paper or record of the Corporation except as otherwise specifically provided by the laws of the State of Delaware or authorized by resolution of the Board of Directors or of the stockholders.

5. From time to time to formulate, establish, promote, and carry out, and to amend, alter, change, revise, recall, repeal, or abolish a plan or plans for the participation by all or any of the employees, including directors and officers

of this Corporation, or of any corporation, company, association, trust, or organization in which or in the welfare of which this Corporation has any interest, and those actively engaged in the conduct of this Corporation's business, in the profits, gains, or business of the Corporation or of any branch or division thereof, as part of this Corporation's legitimate expenses, and for the furnishing to such employees, directors, officers, or persons, or any of them, at this Corporation's expense, of medical services, insurance against accident, sickness or death, pensions during old age, disability or unemployment, education, housing, social services, recreation or other similar aids for their relief or general welfare, in such manner and upon such terms and conditions as the Board of Directors shall determine.

Eleventh: The Corporation may in its By-Laws confer powers additional to the foregoing (not, however, inconsistent with law) upon the Board of Directors, in addition to the powers and authorities expressly conferred upon them by statute.

Twelfth: All corporate powers of the Corporation shall be exercised by the Board of Directors except as otherwise by law or herein provided.

Thirteenth: No contract, transaction or act of the Corporation shall be affected by the fact that any director of the Corporation is in any way interested in, or connected with, any party to such contract, transaction or act, or himself is a party to

such contract, transaction or act. Any director so interested or connected may be counted in determining the existence of a quorum, at any meeting of the Board of Directors which shall authorize any such contract, transaction or act, and may vote thereat to authorize any such contract, transaction or act with like effect as if he were not so interested or connected. Every [99] director of the Corporation is hereby relieved from any disability which might otherwise prevent him from contracting with the Corporation, for the benefit of himself or any firm, corporation, company, association, trust or organization in which or with which he may be in anywise interested or connected.

Fourteenth: The stockholders and the Board of Directors may, if the By-laws so provide, hold their meetings, have an office or offices and keep the books of the Corporation (except such as are required by the laws of the State of Delaware to be kept in Delaware) within or without the State of Delaware, at such place or places as may from time to time be designated by the Board of Directors.

Fifteenth: Whenever a compromise or arrangement is proposed between this Corporation and its creditors or any class of them and/or between this Corporation and its stockholders or any class of them, any court of equitable jurisdiction within the State of Delaware may, on the application in a summary way of this Corporation or of any creditor or stockholder thereof, or on the application of any receiver or receivers appointed for this Corporation

under the provisions of Section 3883 of the Revised Code of 1915 of said State, or on the application of trustees in dissolution or of any receiver or receivers appointed for this Corporation under the provisions of Section 43 of the General Corporation Law of the State of Delaware, order a meeting of the creditors or class of creditors, and/or of the stockholders or class of stockholders of this Corporation, as the case may be, to be summoned in such manner as the said Court directs. If a majority in number representing three-fourths in value of the creditors or class of creditors, and/or of the stockholders or class of stockholders of this Corporation, as the case may be, agree to any compromise or arrangement and to any reorganization of this Corporation as consequence of such compromise or arrangement, the said compromise or arrangement and the said reorganization shall, if sanctioned by the Court to which the said application has been made, be binding on all the creditors or class of creditors, and/or on all the stockholders or class of stockholders of this Corporation, as the case may be, and also on this Corporation.

Sixteenth: The Corporation reserves the right to amend, alter, change or repeal any provision contained in its Certificate of Incorporation, or any amendment thereof, in the manner now or hereafter prescribed by the laws of the State of Delaware, and all rights conferred upon the stockholders of the Corporation are granted subject to this reservation.

Article III.

The By-laws of Sunray, as they shall exist on the effective date of this agreement, shall be and remain the By-laws of the Surviving Corporation until the same shall be altered, amended or repealed, as therein provided.

Article IV.

The outstanding shares of Common Stock of Sunray shall not be changed or converted as a result of the merger, and all shares of such stock which shall be outstanding on the effective date of this agreement (including any shares held in the treasury of Sunray) shall be and be deemed to be shares of Common Stock of the Surviving Corporation, shall remain outstanding, shall be and be deemed to be full-paid and non-assessable and shall be subject to all the provisions of this agreement.

The manner of converting the shares of each of the Constituent Corporations (other than shares of Common Stock of Sunray) into shares of the Surviving Corporation shall be as follows:

(a) Each share of old Preferred Stock of Sunray which shall be outstanding on the effective date of this agreement (including any shares held in the treasury of Sunray) and all rights in respect thereof shall thereupon forthwith be converted into 1 share of 1947 Prior Preferred Stock of the Surviving Corporation.

(b) Each share of Capital Stock of Pacific which shall be outstanding on the effective date of this agreement (except any shares held in the

treasury of Pacific or owned by any other Constituent Corporation) and all rights in respect thereof shall thereupon forthwith be converted into 7/10ths of 1 share of 1947 Prior Preferred Stock of the Surviving Corporation. Any shares of Capital Stock of Pacific held in the treasury of Pacific or owned by any other Constituent Corporation on the effective date of this agreement and all rights in respect thereof shall cease to exist, the certificates therefor shall be cancelled and no shares of stock of the Surviving Corporation shall be issued in respect thereof.

(c) Each share of Capital Stock of Mission which shall be outstanding on the effective date of this agreement (except any shares held in the treasury of Mission or owned by any other Constituent Corporation) and all rights in respect thereof shall thereupon forthwith be converted into 6 shares of Common Stock of the Surviving Corporation. Any shares of Capital Stock of Mission held in the treasury of Mission or owned by any other Constituent Corporation on the effective date of this agreement and all rights in respect thereof shall cease to exist, the certificates therefor shall be cancelled and no shares of stock of the Surviving Corporation shall be issued in respect thereof.

(d) After the effective date of this agreement, each holder of an outstanding certificate or certificates which prior thereto represented shares of stock of a Constituent Corporation

(other than shares of Common Stock of Sunray) shall surrender the same to the Surviving Corporation, and, subject to the provisions of subdivision (e) below as to fractions of shares, such holder shall be entitled upon such surrender to receive in exchange therefor a certificate or certificates representing the number of shares of stock of the Surviving Corporation into which the shares of stock of such Constituent Corporation which prior to such effective date were represented by such outstanding certificate or certificates so surrendered shall have been converted as aforesaid. Until so surrendered, each such outstanding certificate shall be deemed for all corporate purposes, other than the payment of dividends, to evidence the ownership of the shares of stock of the Surviving Corporation into which the shares of stock of the Constituent Corporation which prior to such effective date were represented thereby have been so converted. Unless and until any such outstanding certificate shall be so surrendered, no dividend payable to holders of records of stock of the Surviving Corporation as of any date subsequent to the effective date of this agreement shall be paid to the holder of such outstanding certificate with respect to the number of shares of stock of the Surviving Corporation into which the shares of stock of such Constituent Corporation which prior to such

effective date were represented thereby have been converted, but upon such surrender there shall be paid to the record holder of the certificate for stock of the Surviving Corporation issued in exchange therefor the amount of dividends which has theretofore become payable with respect to the number of full shares of stock of the Surviving Corporation represented by the certificate issued upon such surrender and exchange, plus, in the case of the surrender of any outstanding certificate which prior to the effective date of this agreement represented shares of old Preferred Stock of Sunray, the amount of dividends accrued and unpaid on such shares to such effective date.

(e) No certificates for fractional shares of 1947 Prior Preferred Stock of the Surviving Corporation shall be issued upon any surrender and exchange of certificates which prior to the effective date of this agreement represented shares of Capital Stock of Pacific, but in lieu thereof, if in any case the number of shares of 1947 Prior Preferred Stock of the Surviving Corporation into which the shares of capital stock of Pacific which prior to the effective date of this agreement were represented by a certificate or certificates surrendered as aforesaid have been converted shall include a fraction of a share, the Surviving Corporation shall at its election (1) pay to the person entitled thereto a sum in cash determined by multiplying the sum of $100 by such fraction, or (2) execute

and deliver a non-voting and non-dividend bearing scrip certificate (exchangeable within such period as may be fixed by the Board of Directors, upon surrender thereof with other scrip certificates aggregating one or more full shares, for stock certificates for the number of full shares represented) for such fraction of a share, in such form and containing such terms and conditions as the Board of Directors may approve. [100]

Article VI.

1. On the effective date of this agreement, the Surviving Corporation shall, without other transfer, succeed to and possess all the rights, privileges, powers, franchises and immunities, as well of a public as of a private nature, and be subject to all the restrictions, disabilities and duties of each of the Constituent Corporations, and all and singular the rights, privileges, powers, franchises and immunities of each of the Constituent Corporations, and all property, real, personal and mixed, and all debts due to either of the Constituent Corporations on whatever account, as well for stock subscriptions as all other things in action or belonging to each of the Constituent Corporations, shall be vested in the Surviving Corporation; and all property, rights, privileges, powers and franchises, and all and every other interest, shall be thereafter as effectually the property of the Surviving Corporation as they were of the several and respective Constituent Corpora-

tions, and the title to any real estate, vested by deed or otherwise, under the laws of the State of Delaware or of the State of Nevada or of any of the other states of the United States, in either of the Constituent Corporations, shall not revert or be in any way impaired by reason of the merger or the General Corporation Law of the State of Delaware or the General Corporation Law of the State of Nevada; provided, however, that all rights of creditors and all liens upon any property of each of the Constituent Corporations shall be preserved unimpaired, limited in lien to the property affected by such liens at the time of such merger, and all debts, liabilities and duties of the respective Constituent Corporations shall thenceforth attach to the Surviving Corporation and may be enforced against it to the same extent as if said debts, liabilities and duties had been incurred or contracted by it. The Constituent Corporations hereby respectively agree that from time to time, as and when requested by the Surviving Corporation or by its successors or assigns, they will execute and deliver all such deeds and other instruments and will take or cause to be taken such further or other action as the Surviving Corporation may deem necessary or desirable in order to vest or perfect in, or confirm of record or otherwise, to, the Surviving Corporation title to and possession of all said property, rights, privileges, powers and franchises and otherwise to carry out the purposes of this agreement.

2. The Surviving Corporation shall pay all the expenses of carrying this agreement into effect and of accomplishing the merger.

3. This agreement shall be submitted to the stockholders of each of the Constituent Corporations as provided by law, and it shall take effect and be deemed and be taken to be the agreement and act of merger of said corporations upon the adoption thereof by the stockholders of each of the Constituent Corporations in accordance with the requirements of the General Corporation Law of the State of Delaware and the General Corporation Law of the State of Nevada and upon the execution, filing and recording of such documents and the doing of such acts and things as shall be required for accomplishing the merger by the General Corporation Law of the State of Delaware and the General Corporation Law of the State of Nevada.

4. Anything herein or elsewhere to the contrary notwithstanding, (a) this agreement shall not become effective and shall be null and void for all purposes if Sunray shall not have acquired, prior to or simultaneously with the time at which this agreement is otherwise to become effective, and shall not then be the owner and holder of, the 699,422 shares of Capital Stock of Pacific now owned by Thomas A. J. Dockweiler and George Franklin Getty, II, as trustees under a Declaration of Trust dated December 31, 1934, naming Sarah C. Getty as trustor and J. Paul Getty as original trustee, and the 470,027 shares of Capital Stock of Pacific

now owned by J. Paul Getty, individually and as testamentary trustee under the Decree of Partial Liquidation of the Estate of Sarah C. Getty, deceased, and (b) this agreement may be abandoned (1) by any of the Constituent Corporations at any time prior to its adoption by the stockholders of all of the Constituent Corporations, or (2) by mutual consent of the Constituent Corporations at any time prior to its effective date.

5. The Surviving Corporation agrees that it may be served with process in the State of Nevada in any proceeding for enforcement of any obligation of Mission, including any amount fixed by appraisers or the District Court pursuant to the provisions of Section 41 of the General Corporation Law of the State of Nevada, and hereby irrevocably appoints the Secretary of State of the State of Nevada as its agent to accept service of process in any action for the enforcement of payment of any such obligation or any amount fixed by appraisers, as aforesaid. The address to which a copy of such process shall be mailed by said Secretary of State is: Sunray Oil Corporation, Tulsa, Oklahoma.

6. For the convenience of the parties and to facilitate the filing or recording of this agreement, any number of counterparts thereof may be executed, and each such executed counterpart shall be deemed to be an original instrument.

In Witness Whereof, the Constituent Corporations have caused this agreement to be signed in their respective corporate names by their respective Presidents or Vice-Presidents and their corporate seals to be hereunto affixed and attested by their respective Secretaries or Assistant Secretaries, and a majority of the directors of each of the Constituent Corporations have hereunto set their hands, all as of the day and year first above written.

[Seal] SUNRAY OIL
CORPORATION,
By C. H. WRIGHT,
President.

Attest:
W. D. FORSTER,
Secretary.

C. H. WRIGHT,
A. A. SEELIGSON,
GLENN J. SMITH,
ALFRED L. ROSE,
THOMAS L. BOWERS,
F. B. PARRIOTT,
PAUL E. TALIAFERRO,
F. L. MARTIN,
W. D. FORSTER,
EDWARD HOWELL,
A majority of the directors of
Sunray Oil Corporation.

[Seal] PACIFIC WESTERN OIL CORPORATION,
By D. T. STAPLES,
President.

Attest:
CHARLES F. KRUG,
Secretary.

D. T. STAPLES,
FRANK A. PAGET,
EDWARD GROTH,
FERO WILLIAMS,
RULOFF E. CUTTEN,
A majority of the directors of Pacific Western Oil Corporation. [101]

[Seal] MISSION CORPORATION,
By D. T. STAPLES,
President.

Attest:
ROBERT Z. HAWKINS,
Secretary.

ARTHUR M. BOAL,
D. T. STAPLES,
FERO WILLIAMS,
EMIL KLUTH,
A majority of the directors of Mission Corporation.

"EXHIBIT C"

Whereas, there has been presented to this Board of Directors this morning for the first time a proposed Merger Agreement between this corporation and the Sunray and Pacific Western Oil Corporations, and various other documents and material pertaining to such proposed Merger, and

Whereas, this Board has heretofore taken no action authorizing or designating any person or persons to negotiate the aforesaid Agreement of Merger and the terms and conditions included therein, or to prepare the proxy material and other documents and material pertaining to such Merger which have been presented at this meeting for the approval of this Board, and

Whereas, the members of this Board have not had sufficient time to read and consider the aforesaid documents and further, do not have a reliable opinion of distinterested counsel regarding the legality of the proposed Merger Agreement or any reliable information to enable it to consider the fairness of the terms and conditions of said Merger Agreement, and

Whereas, it is necessary for the protection of the interests of all of the Stockholders of this corporation that this Board have an opinion of reliable disinterested counsel regarding the legality of the proposed Merger Agreement and be fully informed regarding all the facts and circumstances affecting the proposed Merger Agreement and the fairness of the terms and conditions thereof.

Now, Therefore Be It Resolved, that this meeting be recessed until eleven a.m. on the 15th day of November, 1947, and, further [102]

Resolved, that this Board designate a Committee to retain reliable disinterested counsel to render a written opinion regarding the legality of the said Merger Agreement, investigate all the facts and circumstances relating to the proposed Merger Agreement, secure all available information relating to the fairness of the terms and conditions contained therein including a common yardstick appraisal of the values of the constituent corporations and the Skelly Oil Company and deliver to each of the members of this Board a copy of the aforesaid legal opinion and a written report of the results of their investigation including the aforesaid available information relating to the fairness of the terms and conditions of said Merger Agreement, together with their recommendations regarding the acceptance of the terms and conditions of said Merger Agreement or the modification of such terms and conditions, as the case may be, for the consideration and action of this Board at the continuation of the meeting of this board at eleven o'clock on November 15th, 1947. [103]

"EXHIBIT D"

Whereas, it appears that the merger agreement and proxy statement have been prepared by attorneys for Sunray and Eastman-Dillon in consultation with attorneys for The Getty Interests, and

Whereas, said merger agreement and proxy statement were first submitted to counsel for Mission on Friday, October 17th, 1947, and it is apparent that counsel for Mission has not had sufficient time to familiarize himself with all of the terms and conditions of said merger agreement and proxy statement in order to advise the directors of Mission with respect to the legality of the merger, the accuracy and sufficiency of the proxy statement and the liability of the directors of Mission.

Be It Resolved that further consideration of the proposed merger agreement be postponed until Monday, October 20, 1947, at 10:00 o'clock A.M. and that the meeting recess until that time. [104]

State of California,
County of Los Angeles—ss.

William G. Skelly, of lawful age, being first duly sworn, on oath states: That he is the plaintiff in this action; that he has read the within and foregoing Amended Complaint and knows the contents thereof, and that the matters, facts and things therein set out are true, of his own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes them to be true.

/s/ WILLIAM G. SKELLY.

Subscribed and sworn to before me this 17th day of November, 1947.

ETHEL MAHAFFEY,
Notary Public, Los Angeles County, California.

My Commission Expires May 14, 1948.

Service, by copy, of the foregoing Amended Complaint is hereby admitted this 18th day of November, 1947.

/s/ L. D. SUMMERFIELD,
Attorney for Defendant.

[Endorsed]: Filed Nov. 18, 1947. [105]

[Title of District Court and Cause.]

Monday, October 20, 1947, at 10:00 o'clock A.M.

ANSWER TO AMENDED COMPLAINT

Mission Corporation, by its attorneys, Hawkins, Rhodes & Hawkins, Lester D. Summerfield, Esq., and Tompkins, Boal & Tompkins, answering the amended complaint herein, respectfully alleges on information and belief as follows:

First: It denies each and every allegation contained in Paragraph Third of the complaint.

Second: It denies each and every allegation contained in Paragraph Fourth of the complaint except that it admits that the plaintiff is owner of record of 2,000 shares of the defendant and denies knowledge or information sufficient to form the belief as to the allegation of beneficial ownership of 14,000 shares.

Third: It denies each and every allegation contained in Paragraph Sixth of the complaint except that it admits that J. Paul Getty, individually and as Trustee, and Thomas A. J. Dockweiler and

George Franklin Getty 2nd [106] as Trustees, owned 1,169,449 shares of the common capital stock of Pacific Western Oil Corporation out of a total issued and outstanding of 1,371,730, and in the annual meetings of the defendant Pacific Western Oil Corporation voted its stock for the election of the directors of the defendant.

Fourth: It denies each and every allegation contained in Paragraph Seventh of the complaint, except that it admits that Pacific Western Oil Corporation is the owner and holder of record of 641,808 shares of the common stock of the defendant, out of a total issued and outstanding of 1,374,145 shares, and that the remaining shares of stock are owned by upwards of 30,000 different stockholders.

Fifth: It denies each and every allegation contained in Paragraph Eighth of the complaint except that it admits that J. Paul Getty, individually and as Trustee, and Thomas A. J. Dockweiler and George Franklin Getty, 2nd, as Trustees, entered into an agreement with Sunray Oil Corporation under date of October 4, 1947, a copy of which was annexed to the complaint under Exhibit "A." It is admitted that on October 4, 1947 the market price of Pacific Western Oil Corporation common stock on the New York Stock Exchange was $52 per share and admits that its book value on September 30th was approximately $21 per share.

Sixth: It denies each and every allegation contained in Paragraph Ninth of the complaint, except

that it admits that Exhibit "B" attached to the complaint is a copy of the proposed agreement of merger between Pacific Western Oil Corporation, the defendant, and Sunray Oil Corporation, and reference to the agreement, Exhibit "D," is made for the [107] particulars thereof.

Seventh: It denies each and every allegation contained in Paragraph Tenth of the complaint, except that it admits that at a special meeting of the Board of Directors the defendant held on October 18, 1947, the Agreement of Merger (Exhibit "B") attached to the complaint, was approved by a majority of the Board of Directors, Skelly and Hyden voting "No," and that a special meeting of the stockholders was ordered called to be held on the 6th day of December, 1947 at 10 a.m. at the principal office of the defendant, 153 North Virginia Street, Reno, Nevada, to consider and vote upon the proposed Agreement of Merger. The agreement was duly executed by a majority of the defendant's Board of Directors.

Eighth: It denies each and every allegation contained in Paragraph Twelfth of the complaint except that it admits that prior to the meeting the Board of Directors of the defendant on October 18, 1947, B. I. Graves resigned as a director and at said meeting David T. Staples was elected a director to succeed the said B. I. Graves. At the said Directors' meeting of October 18, 1947, the plaintiff was removed as President of the defendant and David T. Staples was elected President in his stead.

Ninth: It denies each and every allegation contained in Paragraph Thirteenth of the complaint, except that it admits that two resolutions attached to the complaint as Exhibits "C" and "D" were proposed by the plaintiff at the meeting of the Board of Directors on October 18, 1947 and were rejected by a majority of the Board.

Tenth: It denies each and every allegation contained in Paragraphs Fourteenth and Fifteenth of the complaint. [108]

Wherefore, defendant prays that the complaint be dismissed with costs.

HAWKINS, RHODES &
HAWKINS,
LESTER D. SUMMERFIELD,
Esq.,
TOMPKINS, BOAL &
TOMPKINS,
Attorneys for Defendant.

/s/ LESTER D. SUMMERFIELD,
/s/ ROBERT Z. HAWKINS,
/s/ BRYCE RHODES,
/s/ ARTHUR M. BOAL,
Of Counsel. [109]

State of Nevada,
County of Washoe—ss.

David T. Staples, being first duly sworn, deposes and says: That he is the President of Mission Corporation, defendant in the above-entitled action; that he has read the foregoing Answer to Amended

Complaint and knows the contents thereof; that the same is true of his own knowledge except as to those matters therein stated on information and belief and he believes those matters to be true.

/s/ DAVID T. STAPLES.

Subscribed and Sworn to before me this 20th day of November, 1947.

[Seal] RUTH T. QUIVEY,
Notary Public in and for the County of Washoe, State of Nevada.

Service by copy admitted November 20, 1947.

/s/ WM. WOODBURN,
One of Attorneys for
Plaintiff.

[Endorsed]: Filed Nov. 20, 1947. [110]

[Title of District Court and Cause.]

INTERROGATORIES AND ANSWERS TO PLAINTIFF'S INTERROGATORIES

Comes Now the defendant Mission Corporation, a corporation, by D. T. Staples, its President, and answers plaintiff's interrogatories heretofore propounded as follows:

1-Q. Does defendant have issued and outstanding any shares of capital stock other than common stock?

A. No. In this connection I attach as an exhibit to these answers a Proxy Statement of Mission Cor-

poration which I understand has been mailed to each stockholder of Mission Corporation, and which contains complete and detailed answers to this question and many of the following questions. [117]

2-Q. Not including shares in defendant's treasury, how many shares of defendant's common capital stock are issued and outstanding?

A. 1,374,145.

3-Q. How many shares of defendant's common capital stock are owned and held by Pacific Western Oil Corporation, a Delaware Corporation?

A. 641,808.

4-Q. Approximately how many persons, firms and corporations are the owners and holders of shares of defendant's capital stock?

A. Approximately 29,300.

5-Q. How many shares of the common capital stock of Tide Water Associated Oil Company are owned by defendant? A. 1,345,593.

6-Q. How many shares of the common capital stock of Skelly Oil Company, a Delaware corporation, are owned by defendant? A. 582,657.

7-Q. How many shares of the common capital stock of Skelly Oil Company are issued and outstanding, exclusive of shares held in its treasury?

A. 981,348.6.

8-Q. How many shares of capital stock does Pacific Western Oil Corporation, a Delaware corporation, have issued and outstanding, exclusive of Treasury stock? A. 1,371,730.

9-Q. How many shares of Pacific Western Oil Corporation stock are owned by (a) Thomas A. J.

Dockweiler and George Franklin Getty II, as Trustees, and (b) J. Paul Getty, individually and as trustee?

A. (a) By Trustees, 699,422.

(b) J. Paul Getty, individually and as Trustee, 470,027.

10-Q. When did Pacific Western Oil Corporation last hold a stockholders meeting for the election of directors? A. April 17, 1947.

11-Q. At said stockholders' meeting how many of the shares of Pacific Western Oil Corporation owned by Thomas A. J. Dockweiler and George Franklin Getty II as trustees, and J. Paul Getty, individually and as trustee, were voted for the election of directors, and for whose election as directors was such stock voted?

A. At the time of said meeting the shares of stock belonging to the Sarah C. Getty Trust stood in the [119] name of Thomas A. J. Dockweiler as Trustee and none stood in the name of Thomas A. J. Dockweiler and George Franklin Getty II as Trustees. Thomas A. J. Dockweiler as Trustee by proxy voted all of the 699,422 shares belonging to the Sarah C. Getty Trust, and J. Paul Getty individually by proxy voted 468,327 shares, and did not vote any of the stock held by him as trustee. Said votes were all cast for the following directors:

Rullof E. Cutten, Lloyd S. Gilmour, Edward Groth, Frank A. Paget, D. T. Staples.

12-Q. What was the total number of shares voted at said meeting? A. 1,169,949.

13-Q. Please state the names of all persons elected directors of Pacific Western Oil Corporation at said stockholders' meeting.

A. Ruloff E. Cutten, Lloyd S. Gilmour, Edward Groth, Frank A. Paget, D. T. Staples.

14-Q. When did Mission Corporation last hold a stockholders' meeting for election of directors?

A. May 8, 1947.

15-Q. Did Pacific Western Oil Corporation, prior to such stockholders' meeting, execute a proxy for the voting of its stock of defendant for election of defendant's directors? [120]

A. Yes.

16-Q. If the answer to the last preceding question is in the affirmative, then state (a) the person or persons named as proxies, or to vote said stock and (b) what instructions were given as to the voting of said stock for directors of Mission Corporation.

A. (a) The person or persons named as proxies, or to vote said stock—B. I. Graves, Robert Z. Hawkins and William G. Skelly.

(b) What instructions were given as to the voting of said stock for directors of Mission Corporation—None. The Mission Proxy Statements, however, which had been prepared and sent to stockholders contained the following statement:

> "The following persons have been designated by the Board of Directors of the Corporation, as nominees for election as directors, and it is the intention of the persons named in the

enclosed form of proxy to vote such proxy for the election of such nominees, at the Annual Meeting of Stockholders to be held May 8, 1947, to hold office as such directors until their respective successors are duly elected and have qualified, or until the next annual meeting of stockholders, whichever shall be first:

Arthur M. Boal
Thomas A. J. Dockweiler
B. I. Graves
Arch H. Hyden
Emil Kluth
W. G. Skelly
Fero Williams"

17-Q. Was the stock of defendant owned by Pacific Western Oil Corporation voted for directors at the last stockholders' meeting of Mission Corporation at which directors were elected?

A. Yes.

18-Q. If you answer the last preceding question in the affirmative, name the persons for whose election as directors such stock was voted? [121]

A. Arthur M. Boal, Thomas A. J. Dockweiler, B. I. Graves, Arch H. Hyden, Emil Kluth, W. G. Skelly, Fero Williams.

19-Q. State the number of shares for which defendant's management held proxies, the names of the persons constituting such management, and the total number of shares voted for election of directors at said meeting?

A. 1,044,599 voted by proxy; 400 were voted individually; total 1,044,999. If I understand the

law correctly, the management of Mission Corporation was its Board of Directors which at that time consisted of Arthur M. Boal, Thomas A. J. Dockweiler, B. I. Graves, Arch H. Hyden, Emil Kluth, William G. Skelly and Fero Williams who were all re-elected at said meeting as directors of Mission Corporation. All the proxies which were voted were given to B. I. Graves, Robert Z. Hawkins and William G. Skelly. Messrs. Graves and Skelly were directors of Mission Corporation, and Hawkins was the secretary of the company and its statutory agent in Nevada.

20-Q. Please state the names of all directors of defendant elected at said meeting.

A. Arthur M. Boal, Thomas A. J. Dockweiler, B. I. Graves, Arch H. Hyden, Emil Kluth, W. G. Skelly, Fero Williams.

21-Q. Was D. T. Staples an officer or director of defendant at any time in the year 1947 prior to October 18, 1947? A. No.

22-Q. Please state (a) the date D. T. Staples was first elected as a director of defendant (b) the date he entered upon the duties of that office, (c) by whom he was elected or appointed and (d) the names of the persons who voted in [122] favor of his election or appointment?

A. (a) First elected as a director on October 18, 1947. (b) Date entered upon the duties of that office—October 18, 1947. (c) By whom elected—Board of Directors. (d) Persons who voted for his election or appointment—Directors Boal, Dockweiler, Kluth and Williams. Directors Skelly and Hyden voted for George Franklin Getty II.

23-Q. Please state (a) the date D. T. Staples was elected as President of defendant, (b) the date he entered upon the duties of that office, (c) by whom he was elected or appointed, and (d) the names of the persons who voted in favor of his election or appointment?

A. (a) Date elected President—October 18, 1947. (b) Date entered upon duties—October 18, 1947. (c) By whom elected or appointed—Board of Directors. (d) Persons who voted in favor of election or appointment—Directors Boal, Dockweiler, Kluth and Williams.

24-Q. Was there a meeting of defendant's Board of Directors on October 18, 1947? A. Yes.

25-Q. Who was President of defendant at the time of convening the Directors' meeting of October 18, 1947? A. W. G. Skelly. [123]

26-Q. Was he removed from office, and if so, when? A. Yes, on that date.

27-Q. What directors, by name, voted for his removal?

A. Arthur M. Boal, Thomas A. J. Dockweiler, Emil Kluth, Fero Williams, D. T. Staples.

28-Q. At or prior to the time of his removal, had any vote been taken by the directors on any merger plan? A. No.

29-Q. Who were defendant's directors on October 18, 1947?

A. Arthur M. Boal, Thomas A. J. Dockweiler, Arch H. Hyden, Emil Kluth, W. G. Skelly, D. T. Staples, Fero Williams. B. I. Graves had prior to said date tendered his resignation to take effect

immediately. After the Board convened at its meeting of October 18, 1947, such resignation was presented to the Board and accepted by it, and D. T. Staples was elected director of the corporation to fill the vacancy caused by such resignation.

30-Q. Name all directors who were present, and all directors who were absent at said meeting.

A. All Present: Arthur M. Boal, Thomas A. J. Dockweiler, Arch H. Hyden, [124] Emil Kluth, W. G. Skelly, D. T. Staples, Fero Williams.

31-Q. Which, if any, of defendant's directors are also directors of Pacific Western Oil Corporation?

A. D. T. Staples and Fero Williams. Director Williams was elected a director of Pacific Western Oil Corporation on October 20, 1947.

32-Q. Which, if any, of defendant's directors are officers of Pacific Western Oil Corporation, and what office or offices in that corporation does each of them hold?

A. D. T. Staples, who holds the Office of President in each of said corporations; Emil Kluth, who is Vice-President of Pacific Western Oil Corporation; and Fero Williams, who is Assistant Secretary and Assistant Treasurer of Pacific Western Oil Corporation.

33-Q. Please examine "Exhibit A" to the Bill of Complaint in this case and state whether or not D. T. Staples has heretofore seen the original of a copy of that document? A. Yes.

34-Q. If the answer to the last preceding question is in the affirmative, then (a) When did he

first see it? (b) Where did he first see it? (c) Who showed it to him? [125]

A. (a) When did he first see it?—About the 4th of October, 1947. (b) Where did he first see it?—Los Angeles, California. (c) Who showed it to him?—Joseph D. Peeler.

35-Q. Is the capital stock of Pacific Western Oil Corporation listed on the New York Stock Exchange? A. Yes.

36-Q. What was the high, low and closing price per share of Pacific Western Oil Corporation stock on the New York Stock Exchange on October 4, 1947?

A. I am not a broker and have no personal knowledge to enable me personally to answer the question. I understand that high was 52, low was 51, close 51¾.

37-Q. What was the book value of Pacific Western Oil Corporation stock on October 4, 1947?

A. No records available to answer as of October 4, 1947.

38-Q. If you cannot answer the last preceding question, what is the date of Pacific Western Oil Corporation's last balance sheet prior to October 4, 1947, and what was the book value of Pacific Western Oil Corporation stock on that date?

A. The last balance sheet of Pacific Western Oil Corporation is of September 30, 1947. I am not an accountant but I am advised by an accountant that the proper analysis of the balance sheet shows a book value of the stock as being $22.80 per share. The book values are determined by the value of

the assets carried on the books and did not in this case and I understand quite often do not represent the actual values of the assets. [126]

39-Q. Did D. T. Staples sign, as defendant's President, a document entitled "Agreement of Merger between Sunray Oil Corporation (a Delaware corporation) and a majority of its directors, Pacific Western Oil Corporation (a Delaware corporation) and a majority of its directors, and Mission Corporation (a Nevada corporation) and a majority of its directors"? A. Yes.

40-Q. Is "Exhibit B" to the Complaint herein a true and correct copy of the Agreement referred to in Question 39? A. Yes.

41-Q. Did D. T. Staples also sign said Agreement of Merger as one of defendant's directors?

A. Yes.

42-Q. When and where did he sign said Agreement of Merger as President and as director of defendant?

A. In Tulsa, Oklahoma, on October 18, 1947.

43-Q. State the name of the other directors of defendant who signed, and when and where they signed said agreement.

A. Names of Directors: Arthur M. Boal, D. T. Staples, Fero Williams, Emil Kluth. When Signed: 10/18/47. Where Signed: In Tulsa, Oklahoma. [127]

44-Q. Who prepared or drafted said Agreement of Merger, and at whose request?

A. My understanding is that the initial rough draft was prepared by Breed, Abbott and Morgan,

counsel for Sunray, at the request of Sunray. It was then reviewed by counsel for Pacific Western Oil Corporation who made suggestions orally and by telephone. The final draft was then prepared and was submitted to and reviewed by counsel for Mission Corporation in Tulsa, Oklahoma, prior to the meeting on October 18, 1947.

45-Q. Were the terms and provisions included in said Agreement discussed with any of defendant's officers or directors prior to October 18, 1947.

A. Yes.

46-Q. If you answer the last preceding question in the affirmative, state the names of such officers and directors, the date or dates of the discussion, and the names of persons with whom the discussion was had.

A. I cannot give an answer that will be inclusive of all possible discussions of said Agreement with all of the officers and directors of Mission Corporation. On the 17th of October, 1947, in the city of Tulsa, I discussed it with Directors Dockweiler, Williams, Kluth and Boal, and for some time prior thereto I had at various times, the precise dates of which I am unable to give, discussed the proposed merger with the individual directors above named either personally or over the telephone. [128]

47-Q. Did any officer, director or agent of Mission Corporation participate in the preparation or drafting of said Agreement of Merger?

A. My information is that no officer, director or agent of Mission Corporation participated in the

drafting of the Agreement of Merger but I cannot answer definitely on that point. Director Boal who was counsel for Mission Corporation stated both at and before the meeting that he had prior to the meeting examined and approved the Agreement as to form and legality.

48-Q. If your answer to the last preceding question is in the affirmative, state the names of all officers, directors, or agents of defendant so participating and the date or dates each participated in the preparation or drafting of said Agreement of Merger? A. See answer to 47.

49-Q. What is the date of the meeting of the Board of Directors of defendant at which a merger of defendant, Pacific Western Oil Corporation and Sunray Oil Corporation was first proposed or considered? A. October 18, 1947.

50-Q. What is the date of the meeting of the Board of Directors of defendant at which the Agreement of Merger, now signed by D. T. Staples, as defendant's President, was first presented to the Board? A. October 18, 1947. [129]

51-Q. Was said Agreement of Merger first presented to defendant's Board of Directors on October 18, 1947?

A. Yes, but the substance of the proposed agreement had previously to said meeting been examined, discussed and analyzed by a majority of the said Board, to wit, by Directors Dockweiler, Boal, Kluth, Williams and also by myself although as stated, I did not become a director until said meeting. It is also my information that the pro-

posed merger had been discussed previously to the said meeting with Directors Skelly and Hyden.

52-Q. At the meeting of defendant's directors on October 18, 1947, approximately how much time was devoted to consideration of the terms of the merger agreement?

A. Four hours and forty-five minutes.

53-Q. Name the directors of defendant voting at said meeting for the proposed merger agreement, or its approval and adoption, and those voting against it.

A. For: Messrs. Boal, Kluth, Staples and Williams. Against: Messrs. Skelly and Hyden. Not Voting: Thomas A. J. Dockweiler.

54-Q. On or prior to October 18, 1947, did any person representing defendant make any appraisal of the assets of defendant, of Pacific Western Oil Corporation, and of Sunray Oil Corporation?

A. There was no formal appraisal made by any person representing Mission Corporation but a careful analysis of the proposed merger was made by Mr. Fero Williams, a director of Mission Corporation, and I am informed that in making the said analysis Mr. Williams had before him among other things the following: Detailed valuation report of Sunray Oil Corporation by Harold J. Wasson, Consulting Engineer, as of March 31, 1946; prospectus of Sunray Oil Corporation covering a debenture issue in 1946; current operating and financial statements; a current report showing tentative estimates of the oil and gas reserves of Sunday Oil Corporation and Pacific Western Oil

Corporation; various other statements and data concerning the constituent corporations, and considered among other things the following factors: oil and gas reserves of the constituent corporations; production of crude oil and other petroleum products; earnings of refineries of Sunray Oil Corporation; production of refined products of Sunray Oil Corporation; history and prospects of constituent corporations; stock market values; earnings and dividend histories and records of constituent corporations; status of the companies, future prospects, expectancy of appreciation and depreciation of values, relationship of values of Skelly and Tidewater, and the continuity of the interests of the present Mission stockholders. My further information is that in making this analysis Mr. Williams was assisted by and collaborated with Mr. Emil Kluth who is head of the Geological Department of Pacific [131] Western Oil Corporation, and is also a Vice-President and Director of Mission Corporation. Mr. Williams discussed his analysis at length with Directors Dockweiler, Kluth and Boal and with myself in Tulsa on October 17, 1947, and I understand that some of said Directors had previously to the said October 17, 1947, discussed the analysis with Mr. Williams when I was not present.

55-Q. If your answer to the last preceding question is in the affirmative, state the name of the person who made the appraisal, by whose authority it was made, the time spent in making it and the appraised value of the assets of each of the three corporations, as shown by said appraisal.

A. See answer to 54.

56-Q. If you answer question 54 in the affirmative, state where or not any written report of such appraisal was made, to whom such report was made, and where the report or a copy of it may be found?

A. See answer 54.

57-Q. Was such report presented to the meeting of defendant's directors on October 18, 1947?

A. Mr. Williams had his working papers with him at the meeting but made no formal report, each director being asked by myself as President as to what he thought of the proposed deal and each expressing his views thereof, Mr. Williams in general summarizing his views as to the fairness of the basis of exchange provided by the Agreement.

58-Q. Was the said Agreement of Merger submitted to defendant's counsel for his opinion prior to October 18, 1947? A. Yes.

59-Q. If you answer the last preceding question in the affirmative, state (a) the name of counsel, (b) the date said agreement was submitted to him, (c) whether or not a written opinion was obtained, and (d) whether or not such opinion was submitted to the Directors Meeting of October 18, 1947?

A. (a) Name of counsel—Arthur M. Boal, (b) Date Agreement was submitted—October 17, 1947, (c) Was written opinion obtained—No, (d) Was opinion submitted—Yes, orally.

60-Q. At the meeting of defendant's directors on October 18, 1947, was there submitted to the Board and financial statements, balance sheets or profit and loss statements of Pacific Western Oil

Corporation, Sunray Oil Corporation and defendant?

A. The balance sheets and profit and loss statements of the Pacific Western Oil Corporation, Sunray Oil Corporation and Mission Corporation were in the possession of Mr. Williams as a part of his working papers and as a part of the data from which he had made his analysis of the values of the assets of the respective companies and he had them with him at the said meeting of October 18, 1947, and they were freely available at the said meeting to any director desiring to see or discuss them. Included among Mr. Williams' working papers were the balance sheets and profit and [133] loss statements of all of the companies as of August 31, 1947, and there was also included the balance sheet and profit and loss statement of Mission Corporation as of September 30, 1947.

61-Q. If your answer to the last preceding question is in the affirmative, state as to each of said corporations what financial statements, balance sheets and profit and loss statements were submitted, and the date of each.

A. See answer to 60.

62-Q. Are any deficiencies in income or excess profits taxes being asserted or proposed or have any been assessed by any governmental officer, agent, or bureau against Pacific Western Oil Corporation or Sunray Oil Corporation?

A. As to the Sunray Oil Corporation, I am advised by that company that the answer is "No," but that there are certain tax years which are still

open and that Sunray has set up a reserve to meet possible additional taxes in the sum of $547,670.00. As to Pacific Western Oil Corporation no deficiencies in income or excess profits taxes have been assessed. but I understand that the internal revenue agents are working on a proposed assessment.

63-Q. If your anwer to the last preceding question is in the affirmative, state as to each of such corporations (a) the tax year or years involved (b) the amount of the deficiencies asserted, [134] proposed or assessed, (c) whether or not such amount or amounts are reflected in the balance sheet of the corporation concerned?

A. The tax year or years involved—1940 to 1946, inclusive, as to both companies. (b) The amount of the deficiencies asserted, proposed or assessed—as stated above I am advised that no additional assessments have been levied as to Sunray Oil Corporation and none proposed that I know of, but the said company has set up the reserve to meet any future additional taxes as set out in the answer to the foregoing question.

As to Pacific Western Oil Corporation no formal assessment has been made but I understand agents of the Bureau of Internal Revenue have orally stated that approximately $98,000.00 additional tax will be proposed to be assessed against Pacific Western.

(c) Whether or not such amount or amounts are reflected in the balance sheet of the corporation concerned—Yes.

64-Q. What tax year or years of Pacific Western Oil Corporation or Sunray Oil Corporation are open for the assessment of deficiencies in income or excess profits taxes?

A. As to Sunray, I am advised that it is for the years 1940 to 1946, inclusive; as to Pacific Western—1940 to 1946, inclusive.

65-Q. Was the information disclosed by your answers to the last three preceding questions disclosed to the defendant's directors at their meeting of October 18, 1947? [135]

A. I do not recollect that the precise matters in the form set out in the last three preceding questions were formally discussed by the Board at its meeting of October 18, 1947. I do recollect clearly that in connection with the resolution approving the merger Director Boal stated that he had the financial statements of all of the companies before him and asked if the Board would like to have them read; that Director Skelly, after consultation with his two lawyers, one seated on each side of him, stated in substance that there was no need of the financial statements being read as all directors had them and were perfectly capable of reading and analyzing them.

66-Q. At or before the meeting of defendant's directors on October 18, 1947 did any of defendant's directors, including D. T. Staples, hear any statement to the effect that the proposed merger must be proceeded with speedily or without delay, or that it must be consummated during the year 1947?

A. I cannot answer as to what possible statements were heard by other directors or officers, but I personally never heard from any of the other directors or officers or any other persons or at all any statements in the form set out in question 66. I did hear statements to the effect that the sale if it were effected must be consummated during the year 1947 and that the sale was conditioned on the consummation of the proposed merger and a tax closing agreement. [136]

67-Q. If the answer to the last preceding question is in the affirmative, please state (a) when and where the statement was made, (b) who made it, (c) in whose presence it was made, and (d) the substance of the statement?

A. (a) When and where the statement was made—In Tulsa preceding and at the meeting of October 18, 1947, and on numerous occasions in Los Angeles during several months preceding October 18, 1947. (b) Who made it—Mr. Dockweiler, Mr. Petigrue, and Mr. Hecht, and possibly others. (c) In whose presence it was made—Some in the presence of Mr. Dockweiler and myself and possibly other persons, some in presence of Mr. Petigrue and Mr. Hecht and possibly others. (d) The substance of the statement—Mr. Dockweiler said that any deal for the sale of the Pacific Western Oil Corporation's stock of the Trustees of the Sarah C. Getty Trust would have to be consummated with the year 1947; that he as Trustee would not take any chance of a change in the tax laws in the year 1948. I also heard both Mr. Petigrue and

Mr. Hecht state that the sale was conditioned upon the merger and a tax closing agreement. I also saw the contract of October 4, 1947.

68-Q. Did any of defendant's directors, including D. T. Staples, ever hear any statement to the effect that Thomas A. J. Dockweiler and George Franklin Getty II, as trustees or otherwise, and J. Paul Getty, [137] individually, and as trustee or otherwise, or any of them, desired to effect a sale of their Pacific Western Oil Corporation stock and receive the money therefor not later than December 31, 1947?

A. As heretofore stated I cannot answer as to what possible statements were heard by other directors or officers but I personally never heard from any of the other officers or directors or any person at all any statement in the form set out in the question. I did hear statements to the effect that heretofore have been set out in answer to question 66.

69-Q. If you answer the last preceding question in the affirmative, please state (a) when and where the statement was made, (b) who made it, (c) in whose presence it was made, and (d) the substance of the statement?

A. (a) When and where the statement was made—I heard the statements set out in the answers to Interrogatories 66 and 67 on one or more occasions in Los Angeles, prior to the meeting of the directors of Mission Corporation on October 18, 1947, and the substance of the statement in Tulsa, Oklahoma, prior to the meeting of October 18, 1947.

(b) Who made it—See answer to 67(b). (c) In whose presence it was made—See answer to 67(c). (d) The substance of the statement—See answer to Question 66.

70-Q. Did any of defendant's directors, including D. T. Staples, ever heard any statement to the effect that for tax reasons, or for reasons concerned with tax liability, Thomas A. J. Dockweiler and George Franklin Getty II, as trustees or otherwise, and J. Paul Getty, as trustee, [138] individually or otherwise, or any of them, desired to dispose of their Pacific Western stock for cash before the end of the year 1947?

A. The answer to 70 in the form it is asked is No. I cannot answer as to what others heard but I never heard and do not believe any other director ever heard any statement that either Thomas A. J. Dockweiler or George Franklin Getty II, as Trustees or otherwise, or J. Paul Getty as Trustee or individually or otherwise desired to sell the Pacific Western Oil Corporation stock or any of it for cash before the end of the year 1947, for tax reasons or saving any taxes. I did hear statements as set out in answer to interrogatory 66.

71-Q. If your answer to the last preceding question is in the affirmative, please state (a) when and where the statement was made, (b) who made it, (c) in whose presence it was made, and (d) the substance of the statement.

A. The answer to 70 in the form in which the question is answered being in the negative, I take it there is no necessity of answering 71. If the

answer as to the statements I did hear can be construed as an affirmative answer, then (a) when and where the statements are made, see answer to 67(a); (b) who made it, see answer 67(b); (c) in whose presence it was made, see answer to 67(c); (d) substance of statement, see answer to 67(d).

72-Q. At the meeting of defendant's directors on October 18, 1947, was there any discussion on the sale of stock of Tide Water Associated Oil Company owned by defendant?

A. My recollection is that sometime during the discussion of the proposed merger the statement was made that Sunray Oil Corporation had indicated that if the merger was consummated Sunray intended to sell the Tide Water stock. [139]

73-Q. If you answer the last preceding question in the affirmative, state (a) the substance of the discussion, and (b) whether or not any vote was taken or resolution adopted concerning it, and (c) the action authorized by the vote or resolution.

A. (a) See answer to 72. (b) No. (c) No resolution was passed or action taken on the matter by the Mission Board nor was any discussion had of any sale by Mission of any stock which it owned.

74-Q. Has the question of selling defendant's stock in Tide Water Associated Oil Company for $25.00 per share ever been submitted to a meeting of defendant's stockholders?

A. No—But Mission proxy statement shows that if merger is consummated Sunray Oil Corporation as the surviving corporation intends to sell such stock.

75-Q. If the proposed merger of Pacific Western Oil Corporation, Mission Corporation and Sunray Oil Company is accomplished, will Skelly Oil Company, a Delaware corporation, become a subsidiary of the corporation surviving the merger?

A. If the proposed merger is consummated the Sunray Oil Corporation will own approximately 60% of the stock of Skelly Oil Company.

76-Q. Does Sunray Oil Corporation have outstanding 2⅞% debentures and 1⅞% promissory note or notes? A. Yes. [140]

77-Q. If you answer the last preceding question in the affirmative, what is the principal amount of said debentures and note or notes?

A. To the best of my information and belief my answer is $20,000,000.00—2⅞% Debentures and $9,000,000.00—1⅞% Promissory Note or Notes.

78-Q. Is it true that if Sunray Oil Corporation's debentures are redeemed this year $20,750,000.00 will be required to redeem debentures of the principal amount of $20,000,000.00? A. Yes.

79-Q. What was the dollar amount of the combined current liabilities of Pacific Western Oil Corporation, Mission Corporation and Sunray Oil Corporation on (a) September 30, 1947, (b) October 18, 1947?

A. (a) My information is that the balance sheets of Pacific Western Oil Corporation, Mission Corporation and Sunray Oil Corporation as of September 30, 1947, show, as of said date, combined current liabilities of $9,009,012.30. (b) There are

no balance sheets available for any of the companies as of October 18, 1947.

80-Q. If you cannot answer the last preceding question, do you know the dollar amount of such current liabilities on any date prior to October 18, 1947? A. See answer to 79.

81-Q. If you answer the last preceding question in the affirmative, state such dollar amount and date. [141] A. See answer to 79.

82-Q. On October 18, 1947, did you have the information included in your answer to question 79 and 81?

A. No, but we had balance sheets for each of the companies as of August 31, 1947 and the balance sheets of Mission Corporation as of September 30, 1947.

83-Q. What may be the maximum amount, in dollars, required to purchase Pacific Western Oil Corporation stock, if the merger of Pacific Western Oil Corporation, Mission Corporation and Sunray Oil Company becomes effective?

A. $93,277,640.00.

84-Q. Is it contemplated that the corporation surviving the merger will make that payment?

A. It is contemplated that Sunray Oil Corporation will make the payment prior to the Agreement of Merger becoming effective.

85-Q. If your answer to the last preceding question is in the negative, who or what corporation is it contemplated will make the payment?

A. Sunray Oil Corporation.

86-Q. Is it true that on the effective date of the merger, or immediately thereafter, the surviving corporation will require $29,750,000.00 in cash to redeem the debentures and pay the note or notes now issued by Sunray Oil Corporation?

A. Yes. [142]

87-Q. Why must such redemption be made?

A. It is my understanding that it is necessary that said redemption be made because of provisions contained in the debentures and notes issued by Sunray Oil Corporation as said matter is fully explained on page 6 of the Proxy Statement sent by Mission Corporation to its stockholders.

88-Q. How is cash to be obtained to make payment to Pacific Western Oil Corporation stockholders and to redeem the debentures and pay the note above mentioned?

A. As explained on page 6 of the Proxy Statement of Mission Corporation heretofore referred to, it is contemplated that certain Tide Water stock will be sold to provide approximately $40,000,000.00 and additional funds will be raised through the sale of new securities of Sunray.

89-Q. On the effective date of the proposed merger and after payments of cash mentioned in questions 83 and 86, what is contemplated or estimated to be the dollar amount of each of the following liabilities (including preferred stock as a liability) of the surviving corporation: (a) Current Liabilities? (b) Debentures or Notes? (c) Prior Preferred Stock? (d) Second Preferred Stock? (e) Other liabilities, not including common stock?

A. I am informed and believe that the companies have estimated approximately as follows: (a) Current Liabilities $21,000,000, (b) Debentures or notes $56,825,000, excluding [143] approximately $4,000,000 included in current liabilities. (c) Prior preferred stock $26,189,300. (d) Second preferred stock $25,000,000. (e) Other liabilities not including common stock $2,785,967.46, excluding $129,866.80 included in current liabilities. I understand that the above answers are based on pro forma condensed consolidated balance sheet as of August 31, 1947, and assume purchase by Sunray of all outstanding shares of capital stock of Pacific Western, the sale of Sunray of $40,000,000 new debentures at the principal amount, a new promissory note in the sum of $14,000,000 in principal amount, and 250,000 shares of Second Preferred Stock at par in retirement of present funded debt, the sale, at $25.00 per share of the common stock of Tide Water Associated Oil Company and provision for income taxes on such sale in giving effect to payment on November 17th of 5 per cent common stock dividend and to the consummation of certain other transactions between August 31, 1947, and the effective date of the merger not pertaining to merger agreement. Such figures represent preliminary estimates only, subject to change since accountants cannot presently produce the final computations.

90-Q. Is there included in your answer to the last preceding question the amount of all commissions, charges and all underwriters discounts to be paid in connection with the various transactions

to be closed on or about the effective date of the merger?

A. Yes, I so understand, except that expenses not included in answer to 89 will be paid in cash and therefore will not be reflected in the figures given in the answer to question 89.

91-Q. How much commission is to be paid Eastman, Dillon & Company, by whom and for what is the payment to be made?

A. My understanding is that as set forth in the Proxy Statement of Mission Corporation on pages 7 and 8, Eastman, Dillon & Company will receive twenty (20) annual installments commencing January 1, 1949, of $87,700.00 without interest, an aggregate of which would be $1,754,000.00, and Eastman, Dillon & Company may receive a placement fee of not more than one-fourth (¼) of one per cent (1%) of the principal amount of the notes if any which are sold by Sunray and also obtain discounts on securities sold by Eastman, Dillon & Company as set out in said Proxy Statement of Mission Corporation on pages 7 and 8, and are payable by Sunray.

92-Q. How much commission is to be paid in connection with the sale of stock of Tide Water Associated Oil Company now owned by Mission Corporation and Pacific Western Oil Corporation and by whom will it be paid? [145]

A. My understanding is that as set forth in the said Proxy Statement of Mission Corporation that if the merger is consummated E. A. Parkford will be paid $292,362.00 by Sunray, and it is also my

understanding that as stated in the said Proxy Statement a consideration for a portion of the fee of Eastman, Dillon & Company as set forth in the foregoing answer is for the sale of said Tide Water stock.

93-Q. What is the total amount of placement fees, underwriters' commissions and discounts to be paid or allowed on the issuance or sale of securities, such as debentures, notes, and preferred stock of the surviving corporation, and by whom will it be paid?

A. See answer to questions 91 and 92. It is my information that in addition to the commissions set forth in said answers to questions 91 and 92, that Sunray has estimated other additional expenses and as set out on page 8 of the Proxy Statement of Mission Corporation in the amount of approximately $500,000.00, to be paid by the surviving corporation.

94-Q. Is the corporation surviving the proposed merger to pay the commissions and discounts mentioned in the last three questions?

A. I understand that they are payable by Sunray Oil Corporation but I am unable to say whether any portion of the $500,000.00 referred to in my answer to question 93 will be paid before or after the merger or by Sunray Corporation before the merger. [146]

95-Q. State which, if any, of the amounts disclosed by your answers to questions 91, 92 and 93 are included in the figures given in answer to question 89. A. All but $500,000.00.

96-Q. Assuming that the Tide Water Associated Oil Company stock now owned by Pacific Western Oil Corporation and defendant is sold for $25.00 per share, will any income tax or capital gains tax liability be incurred thereby?

A. I am advised by tax counsel that the tax liability will be incurred.

97-Q. If your answer to the last preceding question is in the affirmative, state the estimated amount of such tax and by whom it will be payable.

A. I am advised that the tax liability has been estimated, excluding the possibility of any offsets, at $8,215,405.00 and that it will be payable by Sunray Oil Corporation.

98-Q. Is it not a fact that Tide Water Associated Oil Corporation's commitment to purchase its shares owned by Pacific Western Oil Corporation and Mission Corporation is conditioned on (a) approval of the stockholders of Tide Water Associated Oil Company, and (b) obtaining of a loan of approximately $50,000,000.00 by Tide Water Associated Oil Company?

A. I am informed by Sunray Oil Corporation that each of the foregoing is a condition to Tide Water's Agreement to purchase such shares. [147]

99-Q. Is it not a fact that the meeting of the stockholders of Tide Water Associated Oil Corporation to vote upon approval of said stock purchase will not be held until December 8, 1947?

A. That is my information.

100-Q. If said sale of Tide Water Associated Oil Company stock is not consummated, what effect

will that have upon (a) the proposed merger, and (b) the ability of the surviving corporation to obtain required cash?

A. (a) I am not in a position to state definitely how the merger would be affected if the sale of Tide Water Associated Oil Company's stock is not consummated and what effect it would have on the ability of the surviving corporation to obtain required cash, but I am of the belief that it would complicate and possibly prevent the consummation of said merger. (b) Complicate and possibly prevent the surviving corporation from obtaining the required cash.

101-Q. If Thomas A. J. Dockweiler and George Franklin Getty II, as trustees, and J. Paul Getty, individually and as trustee, are not paid in cash $68.00 per share for their stock in Pacific Western Oil Corporation on or immediately prior to the effective date of the proposed merger, what effect will that have upon the proposed merger?

A. In my opinion there would be no merger.

102-Q. Has any estimate been made of the amount of cash which may be required for payment to dissenting shareholders of Pacific Western Oil Corporation, Mission Corporation [148] and Sunray Oil Corporation of the value of their shares?

A. No estimate has been made and it is not believed that at the present there is any basis for such estimate and that any attempt would be based wholly on speculation.

103-Q. If you answer the last preceding question in the affirmative, who made the estimate and what is the dollar amount of such estimate?

A. See answer to 102.

104-Q. What, if any, arrangements have been made to obtain cash to pay all such dissenting shareholders the value of their shares? A. None.

[Original Signed]

[Seal] D. T. STAPLES. [149]

State of California,
County of Los Angeles—ss.

David T. Staples, being first duly sworn, deposes and says: That I am the President of Pacific Western Oil Corporation, a Delaware corporation, and the David T. Staples mentioned in the interrogatories propounded to said corporation, and the answers to the foregoing interrogatories are true as to the best of my information and belief.

[Original Signed] D. T. STAPLES.

Subscribed and sworn to before me this 18th day of November, 1947.

[Seal]

[Original Signed] DOROTHY HENRY,
Notary Public in and for said County and State.

My Commission Expires May 29, 1949.

Service by copy admitted November 20, 1947.

WM. WOODBURN,
One of attorneys for
Plaintiff.

[Endorsed]: Filed Nov. 20, 1947. [150]

[Title of District Court and Cause.]

AFFIDAVIT OF LEO A. ACHTSCHIN

State of Nevada,
County of Washoe—ss.

Leo A. Achtschin, being first duly sworn on oath, deposes and says:

I am a member of the firm of Meyer and Achtschin of Dallas, Texas, Petroleum Consultants. From February 1, 1945 to February 1, 1947, I was a member of the firm of DeGolyer and MacNaughton, Petroleum Consultants. For the three years immediately preceding February 1, 1945, I was working for DeGolyer and MacNaughton on a leave of absence from the Society for Savings Bank of Cleveland, Ohio, where I was Loan Officer and head of the Credit and Statistical Department. I have been employed and have done work in connection with mergers of corporations. In connection with the merger of George F. Getty, Inc., and Pacific Western Oil Corporation in 1946, the firm of DeGolyer and [153] MacNaughton was employed to appraise the value of the assets of each of those corporations and to work out the basis of merger. I was the member of that firm in charge of the appraisal and the working out of the basis of merger.

I have examined and analyzed the financial statements contained in Mission Corporation's notice of meeting and proxy statement, including the December 31, 1946, balance sheets of Sunray Oil Corporation, Pacific Western Oil Corporation, Mis-

sion Corporation and Sunray Oil Corporation and Wholly Owned Subsidiary Pro Forma Condensed Consolidated Balance Sheet, December 31, 1946.

Considering the assets of Sunray Oil Corporation, Pacific Western Oil Corporation and Mission Corporation, which will be acquired and retained by Sunray Oil Corporation at the values shown on the December 31, 1946, balance sheets of those companies, and the liabilities of the surviving corporation as shown by the pro forma condensed consolidated balance sheet above mentioned, it appears that the liabilities and preferred stock of the surviving corporation exceed such assets by approximately $7,700,000. On this calculation the common stock of the new corporation is worth approximately $7,700,000 less than nothing. The detail of the calculation supporting this analysis is attached to this affidavit as Exhibit 1.

The book value of the assets of the constituent companies, which will be owned and retained by Sunray after sale of the Tide Water stock, are shown on their balance sheets at $114,568,620, but are shown on the pro forma condensed consolidated balance sheet at $202,281,968, which is a write-up of $87,713,348. If this write-up is accepted and the number of shares of stock shown on the pro forma balance sheet is corrected to include [154] a five per cent stock dividend, which Sunray has declared, then the book value of each share of common stock of the surviving corporation is $8.60 and the book value of six (6) shares is $51.60.

I have taken the value of the surviving corporation's investment in Skelly Oil Company as shown by the pro forma condensed consolidated balance sheet and substituted it for the value of Skelly stock shown in the calculation of Mission's assets at page 15 of the Mission proxy statement. Using all other values shown at page 15 of the proxy statement for Mission assets, the value of each share of Mission stock is $72.01 or $20.41 more than the book value of six (6) shares of the surviving corporation.

On the basis last mentioned, by exchanging one share of Mission Corporation stock for six (6) shares of stock in the surviving corporation, W. G. Skelly's loss on 14,000 shares would be $285,740. The total loss to the owners of the 732,337 shares of Mission stock (excluding Pacific Western's ownership of that stock) amounts to $14,946,998. I attach to this affidavit as Exhibit 2 the detail of the calculation by which this result is arrived at.

All of the foregoing computations are based upon the financial statements and figures shown in the Mission proxy statement.

/s/ LEO A. ACHTSCHIN.

Subscribed and sworn to before me this 22nd day of November, 1947.

[Seal] /s/ CATHERINE TWEEDT,
Notary Public in and for the County of Washoe, State of Nevada. [155]

EXHIBIT 1

ASSETS OF CONSTITUENT COMPANIES PER BALANCE SHEETS OF DEC. 31, 1946, LIABILITIES PER PRO FORMA, ETC.

BALANCE SHEET

Total assets of Sunray, Pacific Western and Mission Corporation, as shown by their balance sheets of Dec. 31, 1946		$142,301,531
Deduct:		
Balance sheet value of Tide Water stock to be sold	$17,785,826	
Pacific Western's Mission Stock (as entire Mission Corporation is being acquired	9,947,085	
Total		27,732,911
Total assets of surviving corporation per balance sheets of Dec. 31, 1946		$114,568,620
Total Liabilities and Preferred Stock of Surviving Corporation per Pro Forma Condensed Consolidated Balance Sheet		$122,336,382

On this basis there is a deficit of $7,767,762 before common stock is considered at all. In other words the common stock is worth $7,767,762 less than nothing.

EXHIBIT 2

PER SHARE VALUE OF MISSION STOCK AND STOCK OF SURVIVING CORPORATION BASED ON PRO FORMA CONDENSED CONSOLIDATED BALANCE SHEET, DECEMBER 31, 1946

Comment:

Assets shown on balance sheets of the constituent companies at $114,568,620 are shown on the pro forma balance sheet at $202,281,968, which is a write-up of $87,713,348.

The pro forma balance sheet omits from capital account Sunray's 5% stock dividend. The correct figure for total common stock of the surviving corporation outstanding will be 9,298,767 instead of the figure shown on the pro forma balance sheet.

Surviving Corporation—Value for Each Share of Common—$8.60.

Add the amount of surplus and the figure for common stock on the pro forma balance sheet (total $79,945,586) and divide by number of shares of common to be outstanding.

This gives a value of $8.60—for each such share. For six shares the value is $51.60.

Mission Corporation—

Value of Each Share—$72.01

Use the values for Mission assets at page 15 of proxy statement for all assets except Skelly stock. For Skelly stock use the same value used in the pro forma balance sheet. Net value of Mission assets

will then be $98,944,605. Divide this by Mission's outstanding stock, 1,374,145 (not including shares in its treasury). [157]

This gives a value of $72.01 for each share of Mission, approximately $20.41 more than the value of six shares of the surviving corporation.

Loss Computation:

By exchanging one share of Mission for six shares in the surviving corporation:

Plaintiff's loss on 14,000 shares would be $285,740.

The holders of Mission stock other than Pacific Western have 732,337 shares and their total loss would be $14,946,998.

[Endorsed]: Filed Nov. 25, 1947. [158]

[Title of District Court and Cause.]

AFFIDAVIT OF CHESLEY C. HERNDON

State of Nevada,
County of Washoe—ss.

Chesley C. Herndon, of lawful age, being first duly sworn, deposes and says:

I reside, and have resided during the last 33 years, at Tulsa, Oklahoma. I am and have been during the last 28 years the senior vice president and a director of Skelly Oil Company (hereinafter called Skelly), which has its principal business office at Tulsa. During the same 28 years. William G. Skelly, of Tulsa, has been and now is the president and a director of Skelly Oil Company. I am not and

have never been an officer or director of Mission Corporation (hereinafter called Mission) or Pacific Western Oil Corporation (hereinafter called Pacific).

The first time I heard of a possible merger of Skelly, [159] Mission, Pacific, and Sunray Oil Corporation (hereinafter called Sunray), was last Memorial Day (May 30, 1947). On the preceding day, Lloyd Gilmour, head of the New York investment banking firm of Eastman, Dillon & Company (hereafter called Eastman Dillon), and at that time a director of Pacific, who was in Tulsa, asked Mr. Skelly for a meeting with himself and me the following morning, Memorial Day, at Mr. Skelly's office. Mr. Skelly granted the request and he and I met Mr. Gilmour at that time and place. Mr. Gilmour then and there stated that J. Paul Getty and the Getty Trust, of Los Angeles, owners of 85% of the stock of Pacific, had recently tried to sell their stock, at $68 per share, to Tide Water Associated Oil Company, but that the sale had failed of consummation; that he, Gilmour, had presently entered upon a discussion with J. Paul Getty for the purchase by Eastman Dillon of the Gettys' Pacific stock at $58 per share or less, but that in order to raise the money for the purchase Eastman Dillon would have to "do a deal," as he expressed it, involving a merger of Skelly, Mission, Pacific, and Sunray (for which last-named company Eastman Dillon were the bankers and financial advisers and over the management of which they exercised strong influence). The new corporation, proposed to be

called Skelly-Sunray Oil Company, would undertake large new funded debt and preferred stock issues to be sold to the public by Eastman Dillon, and thereby Eastman Dillon would raise the money with which to pay the Gettys. He dwelt upon the advantage to Skelly and to three thousand stockholders who owned the 41% of Skelly stock not owned by Mission, of getting the Gettys out of their position of dominance in the management of Skelly, in which company, although their proprietary interest was equivalent to only 23%, they [160] nevertheless exercised absolute control through the pyramid they had erected (the Gettys owning 85% of Pacific, Pacific owning 47%, which was de facto control, of Mission, and Mission owning 59% of Skelly). Mr. Gilmour's tentative plan, as presented by him, contemplated that the Gettys would not be paid all cash but would be left in the new company with something like 20% of its common stock; that Mission's thirty thousand public stockholders would be given some Skelly-Sunray preferred stock and some common; that Sunray's preferred stockholders would keep their preferred stock and its common stockholders their common stock; but that Skelly's three thousand minority stockholders would be given only Skelly-Sunray common stock. It appeared from his presentation that the new company would start with a very weak capital structure, and with at least $125,000,000 of funded debt and preferred stock issues ahead of its common stock, and it seemed to Mr. Skelly and me that this weak junior position of the common stock would not be good for the Skelly minority stockholders who would hold

nothing but the new Skelly-Sunray common stock. Mr. Skelly and I pointed out to Mr. Gilmour that in Skelly the shareholders were behind no preferred stock and only $15,000,000 of funded debt maturing over a term running to 1965, and that this debt was far more than covered by the company's net current assets. We told him that in view of the domination exercise by the Gettys over Mission and Skelly much more than ordinary circumspection and vigilant fairness would have to be used in such a merger, involving, as it would, huge benefits to the Gettys not shared in kind by minority stockholders, and that the deal would have to be so absolutely and obviously equitable to all interests as to be above suspicion of unfairness and that [161] such equity could be assured only by a complete common-yardstick appraisal of all the properties and of the businesses of the four proposed constituent companies, made at the same time and on the same philosophy of valuation by an independent appraisal firm of the highest standing, whose report when made would be universally accepted as a true gauge of the relative values of the four companies. Mr. Gilmour said that this was absolutely correct, that he would not dare to sponsor the merger on any other basis, and that consideration might be given to his proposal on that assumption. At the end of the interview, which lasted about two hours, Mr. Skelly told Mr. Gilmour that it did not seem to him that a merger such as Mr. Gilmour discussed would be good for Skelly and Mission, but that we would give the matter further thought and in a few days would call him on the phone at his New

York office (for which he said he was leaving immediately) and give him a more mature answer. He said to Mr. Skelly, at parting, "Bill, I think there is merit in this idea but if you don't like it, tell me so and I will drop it and devote my time to something else." Several days later, Mr. Gilmour called Mr. Skelly from New York to inquire what decision had been reached and Mr. Skelly told him that reflection had confirmed our first impression that the proposed merger would not be good for the stockholders of Mission and Skelly and that, consequently, we could not favor it. To this, Mr. Gilmour replied, "All right, I will just forget the whole thing."

I heard no more about the subject (and I think Mr. Skelly did not) until the latter part of July, when dispatches began to appear in the newspapers, to the effect that Eastman [162] Dillon were negotiating with the Gettys for the purchase of their 85% stock control in Pacific, looking toward a merger of Skelly, Mission, Pacific, and Sunray. Mr. J. Paul Getty had not then, nor has he at any time since, discussed the subject with Mr. Skelly and me, nor had Mr. Gilmour since the Memorial Day interview detailed above. The newspaper gossip was annoying and harmful because it tended to impair the morale of the Skelly operating organization.

On July 24, 1947, the Skelly directors assembled in Tulsa for a regular quarterly meeting. All ten directors were present, including Thomas A. J. Dockweiler of Los Angeles, a Getty trustee and a Mission as well as Skelly director, and Emil Kluth

and Fero Williams of Los Angeles, who were officers of Pacific, directors of Mission, and long time Getty employees. While the board was in session, and with Messrs. Dockweiler, Kluth and Williams present, Mr. Skelly answered a newspaper reporter's phone inquiry as to the truth of the merger rumors in the press by stating that neither Skelly nor Mission was considering any merger or was a party to any negotiation. With that statement, Mr. Dockweiler, Mr. Kluth and Mr. Williams explicitly agreed and it appeared that they had no more knowledge than Mr. Skelly and I. That was the first of a series of several such answers given by Mr. Skelly to the press.

Nothing further occurred within my knowledge, in relation to this matter, until September 25, when I received a phone call from Mr. F. L. Martin, Sunray Vice President. To that time neither Mr. Wright, Sunray President, nor Mr. Martin, had mentioned a merger to me. In this phone conversation of September 25, Mr. Martin told me that Mr. Wright had directed him by phone from Los Angeles to transmit a suggestion that Mr. Skelly and I [163] come at once to Los Angeles; that "this man Getty is going to sell his stock and Skelly and Herndon had better hurry out here and try to protect their interests." I said to Mr. Martin that I had not been informed by Mr. Getty or Mr. Wright or anybody else about a deal pending or proposed and that I did not know against whom or what I was to protect myself. I suggested that Mr. Wright phone Mr. Skelly directly, since they are well acquainted and do not need intermediaries. Mr.

Martin replied that Mr. Wright had already done so but that Mr. Skelly had answered that he had no information about any proposed deal and that nobody had negotiated with him; that hence he had nothing before him to justify a trip to California; and that his office was at Tulsa and he could be seen there at any time. I told Mr. Martin that Mr. Skelly's position in that respect seemed to me well taken but that in any event he was competent to determine whether he should go to California. I added that Mr. Wright could phone Mr. Skelly again if he should wish to do so. That ended the conversation.

Beyond further occasional newspaper rumors, apparently of the "planted" or "inspired" kind, and beyond learning in late September that J. Paul Getty and Mr. Dockweiler were putting great pressure on young George F. Getty II, Mr. Dockweiler's co-trustee, to sign an agreement which that young man desired not to sign for the sale of the trust's 51% of Pacific stock to Sunray at the cash price of $68 per share, I heard no more about the subject until Sunday, October 5, 1947. In the evening of that day, Mr. Skelly phoned me at my home to tell me that Mr. Dockweiler has just called him from Los Angeles, saying that on the previous day J. Paul Getty and the Getty trustees had signed an agreement with Sunray and Sunray had signed an [164] agreement with Eastman Dillon, for the sale of all the Getty stock in Pacific and for the merger of Skelly, Mission, Pacific and Sunray, and for financing in connec-

tion therewith, and demanding of Mr. Skelly that as president of Skelly and Mission he call immediate special meetings of the boards of those two companies to approve the agreement of merger and to take other action needed to carry it into effect. Mr. Skelly told me that Mr. Dockweiler said he and Mr. W. K. Petigrue, a New York attorney for Eastman Dillon and Sunray, would arrive in Tulsa within a few days and that the utmost speed was necessary because the Getty's required, for personal tax reasons, that the merger and all related financing be accomplished and the sale be closed and the cash paid to them before December 23, 1947. Mr. Skelly told me that he replied to Mr. Dockweiler that he had not seen any merger agreement or even a rough draft of one, that he knew nothing about the terms of the merger or the financing plans, and that he did not see how he could intelligently and properly call board meetings to approve documents or plans of which he knew nothing. He said he reminded Mr. Dockweiler that a routine special meeting of the Skelly board had already been called for October 17, and that the matter could be considered at that time if we should know anything about it. He said Mr. Dockweiler replied that Mr. C. H. Wright, president of Sunray, would arrive in Tulsa in a day or two from Los Angeles and would deliver to Mr. Skelly copies of the merger agreement and the other two agreements.

On Tuesday, October 7, Mr. Skelly and I saw, for the first time, documents of any kind whatever

relating to the merger or to the sale by the Gettys of their stock, and to [165] that time nobody had negotiated with or informed us concerning the arrangements. In the afternoon of that day, Mr. Wright called on Mr. Skelly in Tulsa and handed him three documents. They were:

(1) A photostat of an agreement of October 4, by J. Paul Getty and the Getty trustees to sell their 85% controlling stock of Pacific to Sunray.
(2) A photostat of an agreement between Sunray and Eastman Dillon for the related financing.
(3) A printed copy of a voluminous agreement of merger, whereby Skelly, Mission, and Pacific were to be merged into Sunray.

Mr. Wright asked that we examine these three documents and arrange a meeting with him. In order to expedite the examination, I immediately called Mr. Wright, with Mr. Skelly's consent, and asked for three additional copies of each document. These he sent to me at 2:15 p.m. the following day, October 8. After such examination as was possible in a limited time, I phoned him, at Mr. Skelly's request, late in the day, proposing a meeting in the Skelly directors' room at 11:00 a.m. the next day, Thursday, October 9.

At that time and place Mr. Skelly and I, with Messrs. German, Villard Martin, and Achtschin, met with Mr. Wright, his vice president Martin, his attorney Taliaferro, and a New York lawyer named B. B. Hadfield, who said he represented

J. Paul Getty. Mr. Wright then handed us one additional document, namely, a carbon copy of a three-page typewritten memorandum entitled "Plan of Purchase of Stock of Pacific Western and Merger of Pacific Western, Mission and Skelly into Sunray," which showed that it had been prepared in the office of Eastman Dillon [166] on September 18. We pointed out to Mr. Wright that in the "Agreement of Merger" and in this "plan" the ratios of exchange of Sunray stock for Mission and Skelly stocks had been deleted, and we inquired what ratios were proposed. He replied that he had had very little to do with the ratios, that they had been developed principally by Eastman Dillon, but that he understood these bankers contemplated about 5 or 6 shares of Sunray common for one Mission and 9 or 10 Sunray common for one Skelly. We inquired how these ratios were developed. He said they were related to market prices, book values, estimated oil and gas reserves, and possibly other factors. We asked whether he could inform us as to the formula or give us any figure used in applying these factors to the development of the ratios, and he said he could not. By this time it was clear that Mr. Wright had only superficial knowledge of the details of Eastman Dillon's plans. He said that in California the negotiations with the Gettys had been so long drawn out and tedious that he had been tempted more than once to withdraw and come home. I said, "Why didn't you?" He replied that he could not because the bankers would not let him withdraw, but he added that he,

too, would like "to make the deal." He said that on the following Monday, October 13, Messrs. Lloyd Gilmour of Eastman Dillon, Petigrue, New York attorney for Eastman Dillon and Sunray, and also Mr. Dockweiler, would be in Tulsa and available for a meeting and would know a great deal more than he, Wright, about the planned merger in all its aspects. I asked whether the present meeting should not be adjourned until the afternoon of that day and he agreed. As the meeting was breaking up, Mr. Hadfield said he was present as attorney for Mr. J. Paul Getty and as an observer for him. He said, further, that "Mr. Getty [167] is determined to make his sale and that the merger is necessary for that purpose, and Mr. Getty expects the companies to come to an agreement on the exchange ratios."

About noon of Monday, October 13, Mr. Dockweiler and Mr. Hadfield called on me at my office. I told them that during my 28 years as an officer and director of Skelly it had been my constant concern to represent faithfully all the stockholders, large and small alike, and that, speaking for that company in which I had an official responsibility, I did not see how the proposed merger could be intelligently considered as to its soundness and its fairness to all the various interests involved except on the solid basis of a common-yardstick appraisal by an independent concern of unimpeachable character, and I added that in the present circumstances this was more than usually important because the merger was planned to achieve a personal purpose

of the Gettys, and not for the benefit of the other stockholders of Pacific, Mission and Skelly and could and would be carried into effect by means of the absolute control which the Gettys hold over these three companies. Mr. Dockweiler and Mr. Hadfield said they were in complete and unqualified agreement with that view.

At 2:00 o'clock in the afternoon of that day (Monday, October 13) a general meeting was held in the Skelly Directors' Room, attended by Mr. Skelly, me, Mr. German, Mr. Villard Martin, Mr. Achtschin, and Mr. Patrick, and by Mr. Wright, his vice president Martin, his engineer Kravis, Mr. Hadfield, Mr. Gilmour, and Mr. Petigrue. Mr. Dockweiler abstained from attending. Mr. Skelly made the point at the opening of the meeting that this merger could not be intelligently and fairly considered without a common-yardstick appraisal. I said that two hours [168] earlier Mr. Dockweiler and Mr. Hadfield had agreed with me about its indispensability, at least so far as Skelly, the company for which I was officially qualified to speak, was concerned. I asked Mr. Hadfield if that was not so. He replied, yes, it was so, that he and Mr. Dockweiler had agreed on that with me that morning, and that he, Hadfield, would not take back a word of it, and that such was Mr. Dockweiler's position also. Without disputing the propriety of such a common-yardstick appraisal, Mr. Petigrue said that the time table that he was obliged to observe, in order for Sunray to close with the Gettys by the date of December 23, which was contemplated as final by the agreement between

themselves and Sunray, would not permit the appraisal to be made, for there was simply not time enough for it. I said that the Gettys and Sunray could extend the time from December 23rd. Mr. Petigrue and Mr. Gilmore replied that that could not and would not be done, since Paul Getty would not allow this matter to carry over into 1948 because of a possible change in his tax liability. Mr. Petigrue then said that in the light of our insistence on a common-yardstick appraisal and the agreement of Mr. Dockweiler and Mr. Hadfield with that view, it appeared that Skelly would have to be dropped from the merger plan, and that his group would have to consider proceeding with the merger of only Pacific and Mission into Sunray. He said that a majority of the Mission directors would be willing to proceed without an appraisal.

Two or three days later I learned that Skelly had been dropped from the plan and that it had been determined to go forward with a merger of the other three companies. After the exclusion of Skelly, I had no further official connection with the [169] matter and I attended no more meetings.

Further the affiant sayeth not.

/s/ CHESLEY C. HERNDON.

Subscribed and sworn to before me this 24th day of November, 1947.

[Seal] /s/ CATHERINE TWEEDT,
Notary Public in and for the County of Washoe, State of Nevada.

[Endorsed]: Filed Nov. 25, 1947.

[Title of District Court and Cause.]

AFFIDAVIT OF ARCH H. HYDEN

State of Nevada,
County of Washoe—ss.

Arch H. Hyden, of lawful age, being first duly sworn, deposes and says:

I went to work for George F. Getty in 1914, in Tulsa, Oklahoma, with his company "Minnehoma Oil Company." He died in May, 1930. I became resident manager of Minnehoma Oil and Gas Company, successor to Minnehoma Oil Company. Its operations were taken over by Skelly Oil Company on May 1, 1938, its offices closed and its personnel disbanded, which arrangement was made by the "Getty Interests." I have been a director of Skelly Oil Company since 1937 and an officer since 1938. However, at the annual meeting of Skelly Oil Company stockholders on October 18, 1947, I was not re-elected as a director of that company, Mission Corporation having voted its 59% of Skelly [171] stock for five new directors to replace an equal number of old directors who were active in the management and operation of Skelly Oil Company (notwithstanding the fact that proxies had been solicited for the re-election of all the old directors).

From 1943 to February 26, 1947, I was vice president and a director of Pacific Western Oil Corporation. From the latter part of 1937 to date I have been and still am a director of Mission Corporation, and since a date long prior to October 1, 1947, have been and still am the owner of six hundred (600) shares of Mission Corporation stock.

Prior to October 12, 1947, I had heard that the Gettys were negotiating for a sale of their stock in Pacific Western Oil Corporation and that there might be involved a merger of Skelly Oil Company, Pacific Western Oil Corporation, Mission Corporation and Sunray Oil Corporation but no one had conferred with or talked with me about or asked my opinion concerning the terms and conditions of any such merger or sale, nor had anyone stated to me what the terms and conditions would be.

On October 12, 1947, Thomas A. J. Dockweiler came to my home in Tulsa, Oklahoma, and had a conversation with me, which he asked me to treat as confidential. He mentioned a proposed merger, but we did not discuss the details.

On Thursday, October 16, 1947, Fero Williams came to my room in the Skelly Building at Tulsa. He said he arrived in town on the day before from Texas, where he had been in a hospital for a minor operation. He told me the proposed merger of Pacific Western, Mission, Skelly and Sunray was off and that a new deal was on involving Pacific Western, Mission and Sunray, Pacific Western stockholders were to receive $68 as in the other deal, and Mission was to be merged into Sunray. He said he had been working on some figures to see how this could be done. He did [172] some figuring on a pad in my room and said that using five or six shares of Sunray common for one share of Mission, the Mission stockholders would only lose a slight interest in Skelly and to offset this difference and the sale of Mission's Tide Water

Associated stock, Mission stockholders would have an interest in Sunray, including Pacific Western. I told him that as far as I was concerned as a Mission director, I would have to see values properly established for the underlying assets of the companies involved before I could intelligently pass on a plan of merger for the three companies.

Williams returned to my room later in the day and suggested that I resign as a Mission director to save me from embarrassment. I said I did not know about that but would think it over and let him know the next day, although I saw no reason why I should resign.

Late that same afternoon, Emil Kluth came into my room while Williams was there, saying he had just arrived for the meetings Friday and Saturday. He made some remark about the proposed merger of the four companies, and Williams said the merger deal had been changed and Skelly Oil Company would not be merged into Sunray Oil Corporation. He, Williams, also said to Kluth: "I will tell you about it when we go to the hotel." Soon after that they left my room.

On Friday afternoon, October 17, 1947, after the meeting of the Skelly board, Dockweiler came to my room. He asked me what I thought about the merger. I said, first, in regard to the suggestion made by Williams the day before, that I resign, I would not resign as I saw no reason for it and I thought I could and would do what was considered right for all stockholders and interests. He then asked me if I would vote for the merger if I [173] thought it was fair. I told him that if

values of the underlying assets of the companies were properly established and presented at the meeting and I thought the basis for merger was fair and equitable for all the Mission stockholders, I would vote for it. As I recall the conversation, he said "all right."

On October 18, 1947, I attended a meeting of the board of directors of Mission Corporation. About 3:00 o'clock p.m. at that meeting, for the first time I saw the Agreement of Merger and draft of the proxy statement. There was not presented to the board any appraisal report or any other pertinent information as to the value of the underlying assets of the companies concerned. Fero Williams and Emil Kluth expressed their opinions as to values. I said that I was not necessarily opposed to a merger or sale but would have to see an appraisal by competent, independent engineers as to the value of the underlying assets of all the companies involved. It was and still is my opinion that the Mission board of directors should have had before it an independent appraisal of all the values in considering the offer of merger.

At the directors' meeting I voted against approval of the merger agreement.

/s/ ARCH H. HYDEN.

Subscribed and sworn to before me this 24th day of November, 1947.

[Seal] /s/ CATHERINE TWEEDT,

Notary Public in and for the County of Washoe, State of Nevada.

[Endorsed]: Filed Nov. 25, 1947.

[Title of District Court and Cause.]

AFFIDAVIT OF WILLIAM G. SKELLY

State of Nevada,
County of Washoe—ss.

William G. Skelly, of lawful age, being first duly sworn, on oath states:

I have been engaged in the oil business for approximately fifty years; I was a director and was president of Pacific Western Oil Corporation for several years prior to February 26, 1947, and am a stockholder in that corporation; I am a director of Mission Corporation and have been for approximately ten years, was its president for about ten years and until October 18, 1947, and own 14,000 shares of its capital stock, two thousand shares of which are of record in my name on the books of the corporation, and twelve thousand shares of which are owned beneficially but are not of record on the books of the corporation; I am president, a director of and a stockholder in Skelly Oil Company.

I regard the Agreement of Merger among Sunray Oil Corporation, Pacific Western Oil Corporation and Mission Corporation as grossly unfair to the stockholders of Mission Corporation [177] other than Pacific Western. I am quite familiar with the assets and oil properties of Pacific Western Oil Corporation and was in close touch with the operations of that corporation while I was its president. Its oil reserves were estimated by De Golyer

and MacNaughton in connection with a merger of that corporation and George F. Getty, Inc., which became effective May 31, 1946. Pacific Western Oil Corporation and Skelly Oil Company jointly own certain oil producing properties. I am informed that on June 23, 1947, the Supreme Court of the United States handed down its decision in the case of the United States vs. The State of California, deciding that the United States is the owner of tide lands and that the State of California is not the owner thereof, and that the effect of the decision is to invalidate leases of such lands executed by the State of California. Pacific Western Oil Corporation owns or operates at least two such leases. According to Sunray Oil Corporation's Registration Statement under The Securities Act of 1933, page 45, the total value of the oil, gas and hydro carbon substances produced and sold from those lands from the inception of those leases to August 31, 1947, approximates $28,600,000. I am advised that Pacific Western Oil Corporation has a potential liability of millions of dollars in connection with this matter and that the exact amount thereof will depend upon a future court decision, and that in any event it has lost the title to its present leases. This latter will affect its oil reserves.

I am generally familiar with the assets and properties of Sunray Oil Corporation, although not to the same extent that I am familiar with those of Pacific Western Oil Corporation. I am entirely

and completely familiar with the assets of Mission Corporation. [178]

Based upon my fifty years experience in the oil business and my knowledge of the properties of Sunray, Pacific Western and Mission Corporation, my considered opinion is that if you take the merger agreement by itself without all the other deals involved, the proposal to exchange six shares of stock of Sunray Oil Corporation for one share of Mission stock is wholly unfair to Mission Corporation and that on the relative values involved, as I believe them to be, Mission shareholders will lose at least one-third of the real value of their shares. I am convinced that an appraisal by a competent disinterested appraiser, applying the same methods of valuation to the properties of thees three corporations, will demonstrate the correctness of my views.

Sunray and Pacific Western have caused various persons to make estimates or appraisal of the value of the assets of the three companies. Among these are Mr. Wasson, whom I understand has several times been engaged by Sunray to make appraisals; Mr. Kravis, who has likewise several times been engaged by Sunray to make such appraisals and is its creditor, and Messrs. Kluth and Williams, who are Getty men. I notice that all the reports bear date some days after Mission's directors met on October 18, 1947, and am not surprised that they appear to substantiate the deal The Getty Interests had made. In my opinion they have greatly overestimated the oil and gas reserves of Pacific Western and Sunray and have likewise overvalued the other assets of those corporations.

However the real vice in all these transactions is the preferential treatment The Getty Interests have procured for themselves. They take cash. There is no question as to the value of cash. The cash to be paid them and other Pacific [178] Western stockholders, together with the cost of the merger and the cost of raising this huge sum will put a great strain on the corporation surviving the member and leave it in a weakened position. It will have sold $48,000,000 worth of its assets. Mission shareholders must take common stock behind an enormous amount of debt and preferred stock. A change in economic conditions or the establishment of a large liability to the United States on the tide lands property might well make the common stock a total loss, and I think its present value is a matter of great doubt.

When I finally agreed, at the urgent request of Mr. J. Paul Getty, to become president and director of "Mission" in 1937, and later director and president of "Pacific" and George F. Getty, Inc., it was with the express understanding that he would give me a free hand in the operation of each of these companies. During all of this time J. Paul Getty and The Getty Trust installed the directors of their own choosing for each of these companies.

During most of the ten years that I have been associated with Mr. J. Paul Getty there have been constant rumors and activities concerning consolidations and mergers. Only one such merger was ever put through, that being between Pacific West-

ern Oil Corporation and George F. Getty, Inc., a wholly owned corporation of the Getty family. It was always my policy and contention that no merger of the Getty controlled companies should ever be consummated without first getting an appraisal of the properties involved by an independent appraiser of well-known reputation and experience, applying the same yardstick of appraisal to the properties of each company involved. [180]

I had no hand in the negotiations between J. Paul Getty and the Shell Oil Company (early in 1947) or between J. Paul Getty and Tide Water Associated Oil Company (March to May, 1947), when Getty was negotiating the sale of "Pacific" stock involving mergers. Both deals, I understand, were conditioned upon the merger of "Pacific," "Mission" and "Skelly." I learned about those negotiations in a round about manner. Mr. Dockweiler did tell me and the other directors of "Mission" at the Reno meeting on May 8, 1947, not to worry about the Tide Water deal, that he was certain it wouldn't be concluded. Of course, I assumed he knew because he was a director of Tide Water, a Getty Trustee, and in constant touch with J. Paul Getty. This was at the same time and in the same meeting when the board authorized the "Mission" officers to do what was necessary to effect the merger between "Pacific" and "Mission." Several weeks after this meeting the proposed merger or consolidation of "Pacific" and "Mission" was abandoned. I was told this was because an entirely new merger deal was being "cooked up" by Lloyd Gilmour (a direc-

tor of "Pacific") of Eastman, Dillon & Co., a New York banking house, and J. Paul Getty. The first definite information I had of this deal was through a conversation on May 29, 1947, with Lloyd Gilmour at Tulsa, Oklahoma. After discussing the matter briefly, I invited him to my office the following morning, which was Decoration Day. There a joint discussion was held with C. C. Herndon, senior vice president of Skelly, Mr. Gilmour and myself. Mr. Gilmour explained to Mr. Herndon and me the plan, which he had given me the evening before. It was discussed at considerable length. Both Mr. Herndon and I told him that we could not consider any merger without an appraisal by a competent well-known appraiser, using the same [181] yardstick of appraisal for all of the constituent company properties, and our assurance that there were no legal obstacles. We also told him that the finance plan seemed fantastic to us in that the debt and preferred stock structure, which he submitted in the plan, was too great and the number of common shares, which would have to be issued was too large. We definitely expressed our position that all stockholders of Skelly and Mission must be protected on their equities and be treated just as fairly as the "Getty Interests." We felt our responsibility to the small stockholders, as well as the "Getty Interests," the dominating stockholder, who held control through a series of pyramiding but actually owned only the equivalent of 23% of Skelly. Mr. Gilmour tried to sell us the idea that the debt and preferred stock structure was not fatally top-heavy but he

agreed with us that the common yardstick appraisal by an independent appraiser should, and he said would, be made and that we "would not dare to sponsor it on any other basis." He further said that the legal phase would have to be worked out satisfactorily and that he would not think of doing "the deal," as he called it, without the conditions we had expressed. The plan, which Mr. Gilmour submitted, Exhibit 1 hereto, proposed the merger of "Pacific," "Mission" and "Skelly" into Sunray, changing the name to "Skelly-Sunray." Under the plan of merger, stockholders of "Mission" and "Pacific" were to be treated exactly alike and for each share of stock they were to receive $20 par value of 4% prior preferred stock, $20 par value of 4½% convertible junior preferred stock, and two shares of common stock of Skelly-Sunray. The plan also contemplated the sale of the Tide Water stock at $25 a share and thereby incurring approximately eight million dollars in [182] capital gains tax. Upon the consummation of the merger, the "Getty Interests" would receive the following securities of the merged company:

4% Prior Preferred	$23,400,000
4½% Conv. Junior Preferred	23,400,000
Common Stock—2,340,000 shs. @ $12	28,080,000
Total—$64 per sh. of Pacific Western	$74,880,000

This plan also provided that the Gettys would receive $46,800,000 "in cash shortly after the closing. This cash would be realized, free of risk, through (a) tender of all the preferred of both

classes, which would realize a minimum of half in cash at par, and (b) sale of the balance to Eastman, Dillon & Co. and Associates for private placement and/or public offering. The 'Getty Interests' would not cause a certificate of merger to be filed until they were satisfied in regard to their realization of cash on the preferred stock not liquidated through tender." The Gettys would thus end up with 2,340,000 shares or about 19% of the common stock.

It was because of this obvious preferential treatment of the Gettys contained in the plan, Exhibit 1, that Mr. Herndon and I were insistent and determined to do our utmost to protect the stockholders of "Mission" and "Skelly," other than the dominating stockholder, and see that they had the same opportunity as the Gettys to realize cash.

Throughout all the merger plans, deals and schemes "cooked up" by J. Paul Getty by and for the Getty Interests, it was evident that he was trying to gain for the Getty Interests a much favored position at the expense of the minority stockholders. At all times he was seeking through devious means or schemes to avail himself of cash at the expense and without the [183] consideration of the remaining stockholders. It was apparent that the surviving stockholders would have to bear the tremendous costs of the merger, involving many millions of dollars, with their only chance of getting cash for their securities being through a sale on the stock exchange, taking all the risk of the market. A few days after the meeting with Mr. Gilmour, he called

me from New York City to discuss this plan and I again reiterated the position Mr. Herndon and I had taken on Decoration Day.

During this period Mr. Clarence Wright, president of Sunray, who lives in Tulsa, approached me several times about a merger of "Pacific," "Mission" and "Skelly" into Sunray. I told him that I had no right and would not oppose the Gettys selling out their Pacific Western stock but if it was contingent upon a merger of any character, involving "Mission" or "Skelly," I would insist on a fair basis, using a common independent appraisal of all property and assets, and that such a plan must be fair and equitable to all stockholders. I said I would oppose any plan or scheme that would not afford all stockholders the same treatment that the Gettys received. Most of the statements he made to me were indefinite as to basic plan, ratios of exchange, financing and the amount of common stock to be issued. There was always an apparent disregard for the minority stockholders, other than the interests of the Gettys.

During this time I heard time and again that the deal was off, then on and off again.

On July 24, 1947, a directors meeting of "Skelly" was in session at Tulsa, Oklahoma. During the meeting I was called by two different newspaper reporters, who asked for a statement pertaining to rumors regarding a merger between [184] "Pacific," "Mission," "Sunray" and "Skelly." In the presence of all the directors and with their consent,

I told both of these reporters that there was not one word of truth so far as I knew. The other directors of Skelly, including Messrs. Dockweiler, Williams and Kluth, were present, heard the denial, knew it was to be published and carried by Associated Press, and acquiesced therein. Mr. Wright, president of "Sunray," was asked for a statement and he made a similar denial. On at least one other occasion later on, I made a similar denial to the press, and at about the same time Mr. Wright, who I understand was visiting in Los Angeles, likewise made a denial of any merger. I had not been consulted by Mr. J. Paul Getty, Mr. Dockweiler or anyone representing the "Getty Interests," nor had I been asked to participate in any negotiations. I was president and director of "Mission," the president and director of "Skelly," and we were never asked, nor was it ever discussed at our directors meetings, even though Messrs. Dockweiler, Williams and Kluth were directors, nor did we ever pass resolutions, authorizing anyone to negotiate a merger with "Sunray," Eastman Dillon & Co. or anyone else. The only information I ever gained regarding the rumors that were afloat in the newspapers, and gossip concerning the latest merger plan of J. Paul Getty, was when Clarence Wright, president of "Sunray," would feel me out and attempt to sell me on the idea of merger.

About August 7th, I received a letter, Exhibit 2, from Arthur M. Boal, "Mission" director, stating that he heard definitely that the "Sunray" proposal

was off because of the objection of George Getty II. A few days later (August 11, 1947) I wrote him, Exhibit 3, stating:

> "I have been tormented with so [185] much merger chaff in the last three or four or five years that it is becoming a real nuisance, and I will be glad of the day when all of this falderal is behind us."

Subsequently, I received another letter from Mr. Boal (August 15, 1947), Exhibit 4, stating:

> "I do not know what is happening in connection with Paul Getty's efforts to sell his Pacific Stock. I did learn indirectly that George Getty II said No as to the Sunray deal. They put a lot of pressure on him but were not able to move him. Now they are cooking up a new deal. Whether it involves merely Paul Getty's stock or Paul Getty's and the Trust I do not know."

Off and on the newspapers began broadcasting rumors that a merger was to take place between the so-called Getty controlled companies and Sunray. The stock of these companies began to turn over in large volume, especially in Sunray, indicating to me that an effort was being made by someone on the inside, working for the interest of promoters and negotiators, in order to justify certain ratios.

On one occasion, Mr. Wright told me that if a merger could be put through, it would get J. Paul Getty "off my neck." He stated that I would be

the chairman of the board of the new corporation and that I "could write my own ticket." I told him that I wasn't interested but when it came to a merger, involving "Mission" or "Skelly," I thought I should be kept fully advised of any plans or matters affecting their status. I felt that as president and director and manager of these two companies, [186] it was my duty to all the stockholders to fairly protect their interests and investments.

I told Mr. Wright that when I started Skelly Oil Company in 1919, I had turned in my personal properties and holdings and have spent the past 28 years, together with my associates, in developing a worthwhile, integrated oil company with large oil and gas reserves. Mr. Herndon and I, working together, had organized and developed an enviable organization of fine, capable men and women as associates and employees, and a splendid group of stockholders who depended on us and who have stayed with the company, whose securities have paid them fairly good dividends, while at the same time, built tremendous values behind these securities, and that no merger would be considered by Mr. Herndon or me unless it was based upon a common yardstick appraisal of all the constituent companies by an independent recognized reliable appraiser. I, naturally, was interested in following up rumors of mergers involving these companies because I felt a deep sense of responsibility to all the stockholders and employees of "Mission" and "Skelly," and further because I had a stock ownership in "Mission" and "Skelly" as well as "Pacific."

In the latter part of September, I received a telephone call from Mr. Wright, who was in Los Angeles, advising that Mr. Herndon and I should come out there immediately in order to protect our interests. During the conversation, I told Mr. Wright no merger plan had been presented to us and that we had no definite information pertaining to any proposed merger being existent. On Sunday evening, October 5th, Mr. Dockweiler telephoned me from California. A contract had been signed with "Sunray" and a merger of "Pacific," "Mission," "Skelly" and "Sunray" was involved. He wanted me to call a directors [187] meeting of "Mission" and "Skelly." I told him that a notice had already gone out for a "Mission" directors meeting, to be held in Tulsa on October 18, 1947, and that a "Skelly" directors meeting would be held October 17th, followed by the annual stockholders meeting on October 18th, and that since no plan of merger had been presented to me, I was not in a position to call an earlier "Mission" or "Skelly" directors meeting. Two days later, on October 7th, Mr. Wright came to my office and left the following three documents: (1) Photostat copy of an agreement, dated October 4th, between J. Paul Getty and the Getty Trustees to sell their 85% stock interest of "Pacific" to "Sunray," (2) Photostat copy of an agreement relating to financing between "Sunray" and Eastman, Dillon & Co., (3) A printed copy of a voluminous "Agreement of Merger" between "Sunray," "Pacific," "Mission" and

"Skelly." He asked me to examine these documents and arrange a meeting with his group. Mr. Herndon and I, in examining these documents, noted that the ratios of exchange on page 25 of the agreement of merger were deleted, apparently by a sharp instrument (Exhibit 5). Mr. Herndon telephoned Mr. Wright for additional copies of these documents in order to expedite the examination and arrange an earlier meeting. On the afternoon of October 8th, additional copies were received, but we found upon examination that the conversion ratios of stock exchange were likewise deleted (Exhibits 6 and 7). A meeting was held in the "Skelly" directors room at 11:00 a.m. on October 9th, at which time and place Mr. Wright, together with his vice-president, Mr. Martin, and his attorney, Mr. Talisferro, were present, representing "Sunray," Mr. B. B. Hadfield of the New York firm of Leve, Hecht & Hadfield, was present and stated that he represented J. Paul Getty, Messrs. [188] Herndon, German, Villard Martin, Achtschin and I were present, representing "Skelly." At that time Mr. Wright handed us a three-page typewritten "Plan of Purchase of Stock of Pacific Western by "Sunray" and Merger of Pacific Western, "Mission" and "Skelly" into "Sunray," (Exhibit 8). This instrument, prepared in the office of Eastman, Dillon & Co., on September 18th, also had the ratios of exchange for "Skelly" and "Mission" stocks deleted. In all of the instruments, which we had received from Mr. Wright, pertaining to the proposed merger, they had been very careful to delete

and withhold from us all information pertaining to the ratios of exchange for "Mission" and "Skelly" stock. We questioned Mr. Wright about this but he stated that he had had very little to do with the ratios and plan of merger. He stated that all that had been handled principally by Eastman, Dillon & Co. but that he understood that the bankers contemplated a ratio of about five or six shares of "Sunray" common for one of "Mission" and nine or ten shares of "Sunray" common for one of "Skelly." We tried to learn from him how these ratios had been developed but he apparently knew practically nothing about the formula or ratios of exchange. We were unsuccessful in learning anything further about the ratios or how they were developed. Mr. Wright said that on Monday, October 13th, Messrs. Lloyd Gilmour of Eastmen, Dillon & Co., Mr. Dockweiler and Mr. Petigrue, New York attorney for Eastman, Dillon & Co. and "Sunray," would be in Tulsa and available for a meeting. He stated that they knew a great deal more about the deal than he. We adjourned, agreeing to meet the following Monday. On the afternoon of Monday, October 13th, a meeting was held in the "Skelly" directors room, at which Mr. Herndon, Mr. German, Mr. Villard Martin, Mr. Achtschin [189] and Mr. Patrick, and I, representing "Skelly," and Mr. Wright, Mr. F. L. Martin, Mr. Kravis, Mr. Petigrue and Mr. Hadfield, representing J. Paul Getty, and Mr. Gilmour, a partner in Eastman, Dillon & Co., were present. A discussion was commenced concerning the proposed merger. I stated that such

a merger could not be fairly and intelligently considered without a common yardstick of appraisal by a practical, competent, well-known engineer. Mr. Herndon stated that Mr. Dockweiler and Mr. Hadfield had been in his office earlier in the day and had definitely and unequivocally agreed with him that such a merger could not go forward without a common yardstick appraisal of all the properties and underlying values. Mr. Hadfield then and there affirmed his and Mr. Dockweiler's statement made to Mr. Herndon that morning, and further said that it was true then and it is true now. Whereupon Mr. Petigrue said that it was imperative that the merger be consummated prior to December 23rd, and that there was no time for such appraisal of the properties. Mr. Herndon suggested that the Gettys should extend the time in order that a merger might be consummated on a fair and equitable basis. Mr. Petigrue and Mr. Gilmour replied that this could not be done. Because of the insistence by Mr. Herndon and myself on a common yardstick appraisal, to which Mr. Dockweiler and Mr. Hadfield had agreed, Mr. Petigrue stated that it would be necessary to drop "Skelly" from the merger plan. Mr. Petigrue then stated that they had another plan involving "Mission," "Pacific" and "Sunray." He said they had canvassed a majority of the directors of each company and found them willing to proceed on the alternate plan and without a common yardstick appraisal. This, of course, had never been presented to or discussed with me, even though I was president of [190] "Mission,"

nor had it been discussed with Mr. Hyden. I am sure it had not been discussed with Mr. Graves, who was in New York, and probably not with Mr. Boal, who did not reach Tulsa until the 16th or 17th of October. Apparently, Mr. Dockweiler, Mr. Williams and Mr. Kluth took it upon themselves to make the decisions for the "Mission" management and board of directors. I was not informed or brought into any discussions pertaining to the proposed three-company merger until the following Saturday, October 18th.

On the morning of October 17th, I received a telegram, dated the same day, pertaining to the "Mission" directors meeting previously called for October 18th. This telegram stated that the meeting was called for the purposes, among others, of "approval and execution of an agreement of merger providing that Mission Corporation, together with Pacific Western Oil Corporation, be merged into and with Sunray Oil Corporation." Even though I was still the president and executive head, I had not seen or been informed of the terms of such three-company proposed merger plan. On October 18th, about fifteen minutes before the Mission directors meeting convened, Mr. Dockweiler came to my office and stated that I "seemed to be out of step with their merger plans." He told me they intended to make some changes in the officers and wondered if I preferred to resign instead of being removed. I told him that under the circumstances and realizing my responsibility to the thirty thousand odd stockholders of "Mission," I would not resign as president. Subsequently, the directors

meeting convened and a telegraph resignation of director B. I. Graves, was presented and accepted. Mr. Staples (president of Pacific Western) was elected a director by the vote of Messrs. Dockweiler, Kluth, Boal and Williams. Thereupon the board proceeded to oust me as president and [191] elect Mr. Staples. After some routine business the meeting recessed at 10:55 a.m.

About 3:00 o'clock in the afternoon, the "Mission" directors reconvened to "approve" the plan of merger. The plan of merger was presented by Messrs. Hecht and Hadfield, J. Paul Getty's attorneys. I requested permission to likewise be represented by personal counsel and called in Mr. Villard Martin and Mr. Joseph A. Patrick. Apparently, all the directors were willing to accept and approve the merger without discussion. There were no valuations or engineers' reports available for our consideration. I asked many questions pertaining to the reserves of the various companies, the valuations, the methods used in arriving at the ratios, and learned that these had apparently all been determined by Eastman, Dillon & Co. None of the directors, other than possibly Mr. Dockweiler, had any apparent knowledge of the new merger plan more than two or three days prior to this meeting. Mr. Hyden and I saw for the first time at the meeting that afternoon the proposed three-company merger plan. We had not been included in any discussions nor given any information about this plan prior to the afternoon meeting. I presented a resolution (Exhibit C to Amended Bill of Complaint) to recess the meeting until November 15th, in order

that the board might retain reliable disinterested counsel, who could render a written opinion regarding the legality of the merger agreement, to permit the directors to obtain necessary information relating to the fairness of the terms and conditions, and concerning a common yardstick appraisal of the values of the constituent corporations. All Getty controlled directors voted against this resolution. Mr. Hyden and I voted in favor of it. I proposed a second resolution to recess the meeting [192] until the following Monday, October 20th, at 10:00 a.m., in order that the merger agreement and proxy statement could be submitted to independent counsel, so that the directors might be fully advised as to the legality and their possible liability and responsibility in connection therewith. Mr. Boal stated that he had the day before, on October 17th, been retained as counsel for "Mission" to advise the board on the legality and fairness of the merger. He had been retained by Mr. Staples, although he (Mr. Staples) was not then an officer or director of "Mission."

This second resolution was likewise voted down by the Getty controlled directors. Mr. Hyden and I voted in the affirmative.

I explained to the directors that in my opinion this was grossly unfair to the minority stockholders of "Mission" and that the ratios of exchange were neither fair nor equitable. I could see no reason why the Gettys should get cash and walk away, leaving the minority stockholders of "Mission" to bear the expense and brunt of the tremendous costs necessary for the proposed merger. The

Getty Interests were taking cash and compelling the stockholders of "Mission" to take common stock behind millions of dollars of preferred stocks, debentures, bank notes and other liabilities. Mr. Dockweiler, a Getty Trustee, after stating to the meeting that he believed that the proposed merger under all conditions and circumstances was fair to all of the stockholders of Mission Corporation, withdrew from the meeting. This is stated in the minutes of the meeting which are in evidence in this case. Thereupon the Getty controlled directors approved the merger over the objections of Mr. Hyden and myself.

I have received, and am still [193] receiving, many letters and proxies from "Mission" stockholders and their attorneys and representatives, stating their opposition to the merger and approval of my efforts to stop it. These represent over 100,000 shares of stock in Mission Corporation.

The Gettys deal for $68 a share for their stock is $16 a share above the market price of the stock at the time the Gettys, Eastman, Dillon & Company and "Sunray" agreed upon the terms of this transaction. This represents a profit above market price of over $18,600,000 to the Gettys and of over $3,300,000 to the other Pacific Western stockholders, or a total of over $22,000,000. If the costs to the surviving corporation, fees, commissions, and expenses incident to raising this money, and the estimated capital gains taxes arising through sale of the Tide Water stock to pay the Gettys, totaling approximately $14,500,000, are added, there is a total of approximately $36,500,000 which the stockholders of

the surviving corporation must bear for the benefit of the Gettys and the other Pacific Western stockholders. Based upon these figures, my pro rate part of the loss due to the Getty profit above market value of their stock totals over $186,000; and if the other 15% of the Pacific Western stockholders accept cash for their stock, this loss will total over $220,000. My proportionate of the $14,500,000 figure would appear to be approximately $147,500. The total of these losses to me alone is approximately $365,000, exclusive of loss in value in my investment, an investment which now has less than $200,000 ahead of my stock and that of all other common stockholders of Mission, an investment which paid during the year 1946 dividends of $1.45 per share, and during the year 1947 dividends of $1.50 per share, an investment which, based upon my knowledge the underlying assets, is expected to pay equal if not greater dividends [194] in the future. With something like $125,000,000 prior indebtedness, debentures, and preferred stock ahead of it in the surviving corporation, the prospects for a return, much less a substantial return, on the same investment in the surviving corporation are indeed dreary.

Further affiant saith not.

WILLIAM G. SKELLY.

Subscribed and sworn to before me this 24th day of November, 1947.

[Seal] CATHERINE TWEEDT,

Notary Public in and for the County of Washoe, State of Nevada. [195]

EXHIBIT 1

PLAN OF MERGER OF PACIFIC WESTERN, MISSION, SKELLY AND SUNRAY

1. Pacific Western, Mission and Skelly are merged into Sunray, whose name is changed to Skelly-Sunray.

2. Terms of merger.

a. Each share of Pacific Western is converted into $20 par value of 4% prior preferred stock ($100 par), $20 par value of 4½% convertible junior preferred stock ($100 par), and two shares of common stock of Skelly-Sunray.

b. Each share of Mission is converted into $20 par value of 4% prior preferred stock ($100 par), $20 par value of 4½% convertible junior preferred stock ($100 par), and two shares of common stock of Skelly-Sunray.

c. Each share of Skelly is converted into nine shares of common stock of Skelly-Sunray.

d. Each share of Sunray preferred is converted into ½ share of 4% prior preferred stock and ½ share of 4½% junior convertible preferred stock of Skelly-Sunray, and each share of Sunray common stock is converted into one share of common stock of Skelly-Sunray.

e. Skelly-Sunray invites tenders up to $27,500,000 par value of its 4% prior preferred stock and up to $27,500,000 of its 4½% convertible preferred stock at par, and states inten-

tion of calling untendered stock up to an amount of tendered and called stock of $27,500,000 par value of each issue. This will retire about 49.5% of the $111,000,000 of new preferred stock initially issued under the merger. The funds are raised as follows:

1. Sale of 1,924,000 shs. Tidewater Common @ 25	$48,000,000
2. Sale of Hotel Pierre	5,000,000
3. Treasury cash	2,000,000
	$55,000,000

A capital gains tax of approximately $8,000,000 would be incurred by reason of the sale of the Tidewater common and the Pierre, which would be reflected in an increase of the same amount in accrued taxes on the balance sheet.

3. Resulting capitalization:

	%*	Amount
Installment notes**	6.1	$15,400,000
Long term bonds**	12.0	30,000,000
4% prior preferred stock ($100)	11.1	28,000,000
4½% convertible junior preferred stock ($100)	11.1	28,000,000
Common stock	59.7	12,500,000 shs.

*Based on par for debt and preferred stock and $12 per share for common stock.

**Same debt as is now outstanding. If additional working capital is needed, funded debt could be increased.

4. Earnings coverage (Taking Skelly and Sun-

ray earnings at rate of first quarter of 1947 and estimating net income of Pacific Western Oil operations at $1,300,000):

Interest ($1,130,000)	Approx. 19.9 times
Interest and prior preferred dividends ($2,250,000)	" 10.0 "
Interest and all preferred dividends ($3,510,000)	" 6.4 "
Per share of common stock	$1.51*

*If convertible preferred is convertible @ $15 per share, full conversion would reduce this figure to $1.41.

5. Asset Values (Sunray and Skelly at book; Pacific Western oil properties at $18,000,000):

Net Tangible ($194,000,000)	
Funded debt	415%
Funded debt and prior preferred	260%
Funded debt and all preferred	190%
Per share of common	$7.30
Net Current ($21,000,000)	
Funded debt	45%
Funded debt and prior preferred	28%
Funded debt and all preferred	20%

6. Junior Market Equity (Common @ $12)

Funded debt	440%
Funded debt and prior preferred	240%
Funded debt and all preferred	146%

ETH:ss
May 26, 1947.

REALIZATION BY GETTY INTERESTS FROM MERGER OUTLINED IN MEMORANDUM OF MAY 26, 1947

1. Getty interests own approximately 1,170,000 shares of Pacific Western common stock.

2. Upon consummation of the merger, Getty interests would receive the following securities of the merged company:

"4% Prior Preferred	$23,400,000
4½% Conv. Junior Preferred	23,400,000
Common Stock—2,340,000 shs. @ $12	28,080,000
Total—$64 per sh. of Pacific Western	$74,880,000"

3. Of the above amounts, about $40 per share of Pacific Western, or $46,800,000, would be realized in cash shortly after the closing. This cash would be realized free of risk through (a) tender of all the preferred of both classes which would realize a minimum of half in cash at par, and (b) sale of the balance to Eastman, Dillon & Co. and associates for private placement and/or public offering. The Getty interests would not cause the certificate of merger to be filed until they were satisfied in regard to their realization of cash on the preferred stock not liquidated through tender.

4. The Getty interest would hold 2,340,000 shares of common, or about 19% of the outstanding stock. Each rise of $1 a share in the market price of this active listed stock over $12 per share would mean a $2 per share higher price on the Pacific Western stock formerly held.

ETH:ss

May 26, 1947.

EXHIBIT 2

[Letterhead of Tompkins, Boal & Tompkins]

(Ingle's letter attached Mr. Skelly's stock)
(The above written in long hand on the exhibit)

August 4, 1947.

Mr. W. G. Skelly
Skelly Oil Company
Tulsa, Oklahoma.

Dear Bill:

I received a copy of a letter written to you a few days ago by Roscoe C. Ingalls. I know Mr. Ingalls quite well and he has talked to me about Skelly, Mission and Pacific Western at different times.

I have never given him any encouragement on these on the theory that the Skelly stock should be split up, or in connection with any merger of any of the companies. I merely listened to what he had to say on those questions and let it go at that.

However, Mr. Ingalls is a very fine man and is quite interested in these companies as an investor and as a broker who has advised clients to purchase these securities—particularly those of Skelly.

I have heard nothing further concerning the Mission-Pacific Western merger, although I have heard that definitely the Sunray proposal is off because of the objections of George Getty 2nd.

With best regards,

Sincerely yours,

/s/ ARTHUR M. BOAL.

AMB:ds [198]

EXHIBIT 3

August 11, 1947.

Mr. Arthur M. Boal
Tompkins, Boal & Tompkins
116 John Street
New York 7, New York

Dear Arthur:

Thanks for your letter of August 4 commenting on the Roscoe C. Ingalls letter. Naturally, I was glad to hear from Mr. Ingalls and have replied to his letter. I am always glad to hear from stockholders or anyone interested in Skelly Oil Company and try to answer them in a frank, constructive manner.

You know that our policy is to devote a lot of our talent and finances in securing added oil and gas reserves and this policy is finally showing real results. Our crude oil production currently is around 52,000 barrels net and our income from natural gas is approximately $250,000 per month, and all other branches of the business are on a comparable bases and, while I am not averse to suggestions for split-ups, etc., etc.—seriously, I would like to keep Skelly Oil Company rolling along as it has been in the past.

I have been tormented with so much merger chaff in the last three or four or five years that it is becoming a real nuisance, and I will be glad of the day when all of this falderal is behind us.

When I was asked to become president of Pacific Western, I made a trip to California and a survey

of the organization and the properties. I found a situation that was unbelievable in the affairs of company management and operations. There was no leadership and no policy, and the properties were in the worst physical condition of anything I have seen during my fifty years' experience in the oil industry . . . intrigue, incompetency, neglect and irresponsibility was the rule, and a liquidating attitude was being pursued. However, there were some very good men within the organization, who, properly placed, could be of real value, and Dave Staples was the only man who had the courage and horse-sense to lead that organization. Then, I transferred one of our most capable and practical oil men from Skelly Oil Company to take over the superintendency of properties . . . and laid down a program to rehabilitate and pursue a policy to build a real oil company, and today, I am proud to say that the Pacific Western is really a going concern and has gained the respect of other oil men on the Pacific Coast.

I know that Pacific Western, Mission and Skelly Oil Company are all on a sound, constructive basis now and, while J. Paul Getty is continually agitating the directors of Mission and Pacific Western to consolidate these two companies, nothing will come of that now because I believe Mr. Getty is more interested in selling his holdings in Pacific Western, and possibly the Trust may be interested.

With warm personal regards, I am,

Yours sincerely,

.....

WGS:ef [199]

EXHIBIT 4

[Letterhead of Tompkins, Boal & Tompkins]

August 15, 1947.

Mr. W. G. Skelly
Skelly Oil Company
Tulsa, Oklahoma.

Dear Bill:

Please accept my thanks for your letter of August 11th. Roscoe Ingalls telephoned me and said that he had had a very nice letter from you. He is a very good friend of the Skelly Oil Company, and has had some of his friends buy the stock. Some of my friends have also bought some.

I know you have done a wonderful job on Skelly Oil and have done a marvelous job for Pacific Western, and I am sure that you are going to continue to do so.

I do not know what is happening in connection with Paul Getty's efforts to sell his Pacific Western stock. I did learn indirectly that George Getty 2nd said No as to the Sunray deal. They put a lot of pressure on him but were not able to move him. Now they are cooking up a new deal. Whether it involves merely Paul Getty's stock or Paul Getty's and the Trust I do not know.

I hope to see you when you are next in New York.

If not, I hope to get to Tulsa for the Mission meeting which will be held at the time of the Skelly meeting in October.

With warmest personal regards, I am,

Sincerely yours,

/s/ ARTHUR M. BOAL.

AMB:ds [200]

EXHIBIT 5

ARTICLE V.

The manner of converting the shares of each of the Constituent Corporations into shares of the Surviving Corporation shall be as follows:

(a) Each share of old Preferred Stock of Sunray which shall be outstanding on the effective date of this agreement (including shares held in the treasury of Sunray) and all rights in respect thereof shall thereupon forthwith be converted into 1 share of 1947 Prior Preferred Stock of the Surviving Corporation. The outstanding shares of Common Stock of Sunray shall not be changed or converted as a result of the merger, and all shares of such stock outstanding on the effective date of this agreement (including shares held in the treasury of Sunray) shall be and be deemed to be shares of Common Stock of the Surviving Corporation, shall remain outstanding, shall be and be deemed to be full-paid and non-assessable and shall be subject to all the provisions of this agreement.

(b) Each share of Capital Stock of Pacific which shall be outstanding on the effective date of this agreement (except any shares held in the treasury of Pacific or owned by any other Constituent Corporation) and all rights in respect thereof shall thereupon forthwith be converted into 7/10ths of 1 share of 1947 Prior Preferred Stock of the Surviving Corporation. Any shares of Capital Stock of Pacific held in the treasury of Pacific or owned by any other Constituent Corporation on the effective date of this agreement and all rights in respect thereof shall cease to exist, the certificates therefor shall be cancelled and no shares of stock of the Surviving Corporation shall be issued in respect thereof.

(c) Each share of Capital Stock of Mission which shall be outstanding on the effective date of this agreement (except any shares held in the treasury of Mission or owned by any other Constituent Corporation) and all rights in respect thereof shall thereupon forthwith be converted into ..... shares of Common Stock of the Surviving Corporation. Any shares of Capital Stock of Mission held in the treasury of Mission or owned by any other Constituent Corporation on the effective date of this agreement and all rights in respect thereof shall cease to exist, the certificates therefor shall be cancelled and no shares of stock of the Surviving Corporation shall be issued in respect thereof.

(d) Each share of Common Stock of Skelly which shall be outstanding on the effective date of this agreement (except any shares held in the treasury

of Skelly or owned by any other Constituent Corporation) and all rights in respect thereof shall thereupon forthwith be converted into ..... shares of Common Stock of the Surviving Corporation. Any shares of Common Stock of Skelly held in the treasury of Skelly or owned by any other Constituent Corporation on the effective date of this agreement and all rights in respect thereof shall cease to exist, the certificates therefor shall be cancelled and no shares of stock of the Surviving Corporation shall be issued in respect thereof.

(e) After the effective date of this agrement, each holder of an outstanding certificate or certificates which prior thereto represented shares of stock of a Constituent Corporation (other than Common Stock of Sunray) shall surrender the same to the Surviving Corporation, and, subject to the provisions of subdivision (f) below as to fractions of shares, such holder shall be entitled upon such surrender to receive in exchange therefor a certificate or certificates representing the number of shares of stock of the Surviving Corporation into which the shares of stock of such Constituent Corporation which prior to such effective date were represented by such outstanding certificate or certificates so surrendered shall have been converted as aforesaid. Until so surrendered each such outstanding certificate shall be deemed for all corporate purposes, other than the payment of dividends, to evidence the ownership of the shares of stock of the Surviving Corporation into which the shares of stock of the Constituent Corporation which prior to such

effective date were represented thereby have been so converted. Unless and until any such outstanding certificate shall be so surrendered, no dividend payable to holders of record of stock of the Surviving Corporation as of any date subsequent to the effective date of this agreement shall be paid to the holder of such outstanding certificate with respect to the number of shares of stock of the Surviving Corporation into which the shares of stock of such Constituent Corporation which prior to such effective date were represented thereby have been converted, but upon such surrender there shall be paid to the record holder of the certificate for stock of the Surviving Corporation issued in exchange therefor the amount of dividends which has theretofore become payable with respect to the number of full shares of stock of the Surviving Corporation represented by the certificate issued upon such surrender and exchange. [201]

EXHIBIT 6

AGREEMENT OF MERGER

Between Sunray Oil Corporation (a Delaware corporation) and a majority of its directors, Pacific Western Oil Corporation (a Delaware corporation) and a majority of its directors, Mission Corporation (a Nevada corporation) and a majority of its directors, and Skelly Oil Company (a Delaware corporation) and a majority of its directors.

Merging pursuant to Section 59 of the General Corporation Law of the State of Delaware and

Section 39 of the General Corporation Law of the State of Nevada into Sunray Oil Corporation as the Surviving Corporation.

Proof of October 2, 1947.

[Notation]: Received from Wright's office, 2:15 p.m. 10/8/47. C. C. H. [202]

EXHIBIT 7

ARTICLE V.

The manner of converting the shares of each of the Constituent Corporations into shares of the Surviving Corporation shall be as follows:

(a) Each share of old Preferred Stock of Sunray which shall be outstanding on the effective date of this agreement (including shares held in the treasury of Sunray) and all rights in respect thereof shall thereupon forthwith be converted into 1 share of 1947 Prior Preferred Stock of the Surviving Corporation. The outstanding shares of Common Stock of Sunray shall not be changed or converted as a result of the merger, and all shares of such stock outstanding on the effective date of this agreement (including shares held in the treasury of Sunray) shall be and be deemed to be shares of Common Stock of the Surviving Corporation, shall remain outstanding, shall be and be deemed to be full-paid and non-assessable and shall be subject to all the provisions of this agreement.

(b) Each share of Capital Stock of Pacific which shall be outstanding on the effective date of this

agreement (except any shares held in the treasury of Pacific or owned by any other Constituent Corporation) and all rights in respect thereof shall thereupon forthwith be converted into 7/10ths of 1 share of 1947 Prior Preferred Stock of the Surviving Corporation. Any shares of Capital Stock of Pacific held in the treasury of Pacific or owned by any other Constituent Corporation on the effective date of this agreement and all rights in respect thereof shall cease to exist, the certificates therefor shall be cancelled and no shares of stock of the Surviving Corporation shall be issued in respect thereof.

(c) Each share of Capital Stock of Mission which shall be outstanding on the effective date of this agreement (except any shares held in the treasury of Mission or owned by any other Constituent Corporation) and all rights in respect thereof shall thereupon forthwith be converted into ..... shares of Common stock of the Surviving Corporation. Any shares of Capital Stock of Mission held in the treasury of Mission or owned by any other Constituent Corporation on the effective date of this agreement and all rights in respect thereof shall cease to exist, the certificates therefor shall be cancelled and no shares of stock of the Surviving Corporation shall be issued in respect thereof.

(d) Each share of Common Stock of Skelly which shall be outstanding on the effective date of this agreement (except any shares held in the treasury of Skelly or owned by any other Constituent Corporation) and all rights in respect thereof shall thereupon forthwith be converted into ..... shares

of Common Stock of the Surviving Corporation. Any shares of Common Stock of Skelly held in the treasury of Skelly or owned by any other Constituent Corporation on the effective date of this agreement and all rights in respect thereof shall cease to exist, the certificates therefor shall be cancelled and no shares of stock of the Surviving Corporation shall be issued in respect thereof.

(e) After the effective date of this agreement, each holder of an outstanding certificate or certificates which prior thereto represented shares of stock of a Constituent Corporation (other than Common Stock of Sunray) shall surrender the same to the Surviving Corporation, and, subject to the provisions of subdivision (f) below as to fractions of shares, such holder shall be entitled upon such surrender to receive in exchange therefor a certificate or certificates representing the number of shares of stock of the Surviving Corporation into which the shares of stock of such Constituent Corporation which prior to such effective date were represented by such outstanding certificate or certificates so surrendered shall have been converted as aforesaid. Until so surrendered, each such outstanding certificate shall be deemed for all corporate purposes, other than the payment of dividends, to evidence the ownership of the shares of stock of the Surviving Corporation into which the shares of stock of the Constituent Corporation which prior to such effective date were represented thereby have been so converted. Unless and until any such outstanding certificate shall be so surrendered, no divi-

dend payable to holders of record of stock of the Surviving Corporation as of any date subsequent to the effective date of this agreement shall be paid to the holder of such outstanding certificate with respect to the number of shares of stock of the Surviving Corporation into which the shares of stock of such Constituent Corporation which prior to such effective date were represented thereby have been converted, but upon such surrender there shall be paid to the record holder of the certificate for stock of the Surviving Corporation issued in exchange therefor the amount of dividends which has theretofore become payable with respect to the number of full shares of stock of the Surviving Corporation represented by the certificate issued upon such surrender and exchange. [203]

EXHIBIT 8

"Received from C.H.W. 11 a.m., 10/9/47"

(The above written in long hand on the exhibit)

PLAN OF PURCHASE OF STOCK OF PACIFIC WESTERN BY SUNRAY AND MERGER OF PACIFIC WESTERN, MISSION AND SKELLY INTO SUNRAY

1. Sunray purchases 1,174,000 shares of Pacific Western Common Stock from Paul Getty and the Trust at $68 per share, or $79,832,000.

2. Sunray offers to buy the remaining 198,000 shares of Pacific Western Common Stock from the

minority stockholders at $68 per share or $13,464,000.

3. Pacific Western, Mission and Skelly are merged into Sunray, whose name is changed to Skelly-Sunray under the following plan of merger:

A. Each share of Pacific Western Common Stock not sold to Sunray pursuant to the above offer is converted into $70 par value of 4½% Prior Preferred Stock ($100 par) of Skelly-Sunray.

B. Each share of Mission Common Stock is converted into (....) shares of Skelly-Sunray Stock.

C. Each share of Skelly Common Stock is converted into (....) shares of Skelly-Sunray Common Stock.

D. Each share of Sunray Preferred Stock is converted into one share of 4½% Prior Preferred Stock ($100 par) of Skelly-Sunray, and each share of Sunray Common Stock is converted into one share of Skelly-Sunray Common Stock.

E. If all of the minority stockholders of Pacific Western accept the above-mentioned $68 cash offer, $93,296,000 will have to be raised to be paid at the closing to Paul Getty, the Trust, and the Pacific Western minority stockholders. If none of the minority stockholders accept the offer, $79,832,000 will have to be raised. In either event, the funds will be raised through sale of the 1,919,347 shares of

Tide Water Common Stock now owned by Pacific Western and Mission, and through public offering or private placement of 3% long term debt and 4½% Convertible Preferred Stock ($100 par) of Skelly-Sunray as follows:

	All Minority Stockholders Accept	No Minority Stockholders Accept
Sale of Tide Water Common Stock at 25	$48,000,000	$48,000,000
Sale of Long Term Debt at 100 net to Co.	16,000,000	16,000,000
Sale of Conv. Pfd. Stock at 100 net to Co.	29,296,000	15,832,000
	$93,296,000	$79,832,000

To whatever extent the minority stockholders of Pacific Western Common Stock accept the $68 cash offer, the amount of 4½% Prior Preferred Stock issued to them will be decreased and the amount of 4½% Convertible Preferred Stock sold by the company will be increased. For instance, if holders of half of the Pacific Western Common Stock owned by the minority stockholders accept the case offer, the above table would become as follows:

Sale of Tide Water Common Stock at 25	$48,000,000
Sale of Long Term Debt at 100 net to Co.	16,000,000
Sale of Convertible Preferred Stock at 100 net to company	22,564,000
	$86,564,000

4. The resulting capitalization on the basis of the two extremes in regard to acceptance of the cash offer would be as follows:

		All Minority Stockholders Accept		No Minority Stockholders Accept	
	%*	Amount		%*	Amount	
Present Installment Notes....	5.6	$15,400,000		5.6	$15,400,000	
Present Long Term Debentures	10.9	30,000,000		10.9	30,000,000	
New Long Term Debt.....	5.8	16,000,000		5.8	16,000,000	
4½% Prior Preferred Stock..	9.8	27,000,000		14.8	40,860,000	
4½% Conv. Preferred Stock..	10.7	29,296,000		5.7	15,832,000	
Common Stock	57.2	13,070,000	Sh.	57.2	13,070,000	Sh.

*Based on par for debt and Preferred Stocks and $12 per share for Common Stock.

5. Earnings Coverage (Taking Skelly and Sunray earnings at rate of second quarter of 1947, estimating net income of Pacific Western's oil properties at $1,300,000 per annum and estimating net income of Getty Realty at $720,000 per annum.)

		All Minority Stockholders Accept	No Minority Stockholders Accept
Interest	approximately	20.1 times	20.1 times
Interest & Pr. Pfg. Divs.....	"	11.4 "	9.4 "
Interest & All Pfd. Divs.....	"	7.8 "	7.8 "
Per share of Common Stock.....		$2.17*	$2.18*

*If the Convertible Preferred is convertible at $15 per share, full conversion would reduce these figures to $1.97 and $2.04 respectively.

6. Asset Values (Sunray and Skelly at book; Pacific Western oil properties at $20,000,000, Hotel Pierre at $2,570,000). [205]

	All Minority Stockholders Accept	No Minority Stockholders Accept
Net Tangible ($195,000,000)		
Funded Debt	310%	310%
Funded Debt and Prior Pref.	218%	189%
Funded Debt and All Pref.	164%	164%
Common Stock	$5.80	$5.80
Net Current ($21,000,000)		
Funded Debt	33%	33%
Funded Debt and Prior Pref.	23%	20%
Funded Debt and All Pref.	18%	18%
7. Junior Market Equity (Common at $12)		
Funded Debt	340%	340%
Funded Debt and Prior Pref.	208%	168%
Funded Debt and All Pref.	131%	131%

9/18/47. ETH:G

[Letterhead Thatcher, Woodburn and Forman]

November 25, 1947

Hon. Roger T. Foley
United States District Judge
Carson City, Nevada

Re: Skelly vs. Mission Corporation
Civil No. 669.

Dear Judge Foley:

Since the filing of the affidavits in the above-entitled case, Mr. Skelly has received the enclosed telegram which bears directly upon the statements made by counsel for the defendant Mission Corporation that the Department of Justice had approved the merger of the three corporations.

With your kind permission we wish to incorporate this telegram and make this telegram a part of the affidavit of William G. Skelly on file in this action.

A copy of the telegram and of this letter is being sent to opposing counsel.

Yours sincerely,
/s/ JOHN P. THATCHER.

jpt:mlr
enc. 1 [207]

[Western Union Telegram]

1947 Nov 25 PM 2 03

T B 15
T.WA365 PD-SH Washington DC 25 44 2P

W. G. Skelly—
Riverside Hotel Reno Nev—

I understand that the attorneys for Sunray Oil Company and their associates have made the statement that the Department of Justice has approved the merger of Pacific Western, Mission Corporation, Sunray and Skelly. Attorney General Clark informed me this morning and authorized me to state to you that they had not approve this merger but were deferring final decision pending the outcome of your stockholders' suits in the District Court of Nevada and of Southern California. He further stated that when these cases were concluded he would personally review the evidence, the law, and the facts, including the record made in your two stockholders suits, and only after so doing would make a determination as to whether or not there was a violation of the Clayton act—

BURTON K. WHEELER.

[Endorsed]: Filed Nov. 25, 1947. [208]

[Title of District Court and Cause.]

AFFIDAVIT OF HAROLD C. STUART

State of Nevada,
County of Washoe—ss.

Harold C. Stuart, of lawful age, being first duly sworn, on oath states:

I am a stockholder owning twenty (20) shares of capital stock of Mission Corporation and on this 24th day of November, 1947, I examined the stockholders minutes for the past ten years as exhibited to me by the corporation's secretary, Robert Z. Hawkins. I found that at the following annual meetings the number of shares represented and the number of shares outstanding as follows:

Date	Number of Shares Present and By Proxy	Number of Shares Outstanding
May 13, 1937	1,112,776	1,399,345
May 12, 1938	1,014,237	1,379,545
May 11, 1939	1,078,582	1,379,245
May 9, 1940	1,028,815	1,378,645
May 8, 1941	1,016,405	1,375,145
May 14, 1942	1,042,830	1,375,145
May 13, 1943	998,063	1,375,145
May 11, 1944	1,027,283	1,375,145
May 10, 1945	1,011,509	1,375,145
May 8, 1946	976,931	1,375,145
May 9, 1947	1,044,999	1,375,145

Further Affiant saith not.

HAROLD C. STUART.

Subscribed and sworn to before me this 24th day of November, 1947.

[Seal] ETHEL HANNA,
Notary Public in and for the County of Washoe, State of Nevada.

[Endorsed]: Filed Nov. 25, 1947. [210]

[Title of District Court and Cause.]

AFFIDAVIT OF THOMAS A. J. DOCKWEILER

State of California,
County of Los Angeles—ss.

Thomas A. J. Dockweiler, being first duly sworn, deposes and says:

I am an attorney and counselor-at-law having my office in the City of Los Angeles, State of California, and having been such attorney and counselor-at-law for more than thirty-two (32) years. I am a resident and citizen of the State of California, a member of the State Bar of California, duly licensed to practice in all of the courts of such State, the United States Supreme Court, the United States Court of Appeals for the Ninth Circuit and the United States District Court for the Southern District of California.

I am one of the two trustees of the trust created and provided for in that certain Declaration of Trust dated December 31, 1934, in which Sarah C. Getty is named Trustor and J. Paul Getty the original trustee. The other trustee of said trust now serving with me is George Franklin Getty II, the son of J. Paul Getty. [211]

The entire corpus of the above trust, of which I am one of the trustees, consists of approximately fifty-one per cent (51%) of the outstanding stock of Pacific Western Oil Corporation (hereinafter referred to as "Pacific"); there are no other assets in trust.

In March of this year Paul Getty and myself and my co-trustee of the above trust received a proposal from Tide Water Associated Oil Company (hereinafter referred to as "Tide Water") to purchase our stock holdings of Pacific at $68.00 per share subject to Tide Water obtaining a clearance from the Anti-Trust Division of the Department of Justice. The Department of Justice refused to approve the acquisition of the controlling Pacific stock by Tide Water and the proposal was abandoned.

Subsequent to the abandonment of the Tide Water proposal I learned from Paul Getty that he had been approached on behalf of Sunray Oil Corporation (hereinafter referred to as "Sunray") with another proposal for the acquisition of the Pacific stock held by the trust and himself. In June Sunray made a proposal whereby Paul Getty and the trust could receive $58.00 per share cash for their stock, conditioned upon a merger of Pacific, Mission Corporation (hereinafter referred to as "Mission") and Skelly Oil Company (hereinafter referred to as "Skelly") into Sunray and based upon certain other conditions. The trustees, however, determined that $58.00 per share was an inadequate consideration for the stock of Pacific owned by the trust and rejected the offer. There then ensued negotiations which resulted in an offer of $68.00 per share cash, which after a great deal of consideration was found to be acceptable to the trustees. This offer, too, was conditioned, among other things, upon Sunray being able to work out with the managements of Pacific

Mission and Skelly a merger of those companies with Sunray upon fair and equitable terms and the approval of such merger by the respective stockholders of all the corporations. The contract of October 4, 1947, a copy of which is annexed to the complaint as [212] Exhibit A, was prepared, setting forth the agreement of the parties and was executed by Paul Getty, my co-trustee and myself as trustee, and Sunray.

One of the conditions to the contract, insisted upon by Paul Getty and the trustees, was that the other stockholders of Pacific be afforded an opportunity to sell their stock at the same price as Paul Getty and the Getty Trust. All of the parties to the contract were in complete agreement in expressing the necessity that any merger plan which should be submitted to the stockholders of the several corporations for their approval would have to be fair and equitable in all respects to the stockholders of all of the corporations.

I have never been a director of Pacific, but because of the large amount of stock which the trust had in said company I have kept in close touch with its affairs. I have been a director of Mission since about January, 1936, which was not long after the organization of that corporation, and which was more than five (5) years prior to the time I became a trustee of the above-mentioned trust. I was sole trustee of the above trust from September, 1941, to July, 1946, when George Franklin Getty II qualified as my co-trustee.

During the pendency of the negotiations with Sunray, I advised Messrs. D. T. Staples, Emil Kluth and Fero Williams of such negotiations and of the possibility that if an agreement were made among the trustees, Paul Getty and Sunray, a proposal for merger would probably be submitted to the respective Board of Directors. During the negotiations I was advised that the initial bases of exchange was between five and six shares of Sunray for each share of Mission, and between nine and ten shares for each share of Skelly. I did not investigate into the fairness of the bases of exchange at such time but they did not seem out of line inasmuch as the stock of Sunray on the New York Stock Exchange was selling at the time in [213] excess of $10.00 per share and the stock of Mission was selling on the New York Stock Exchange in the middle 30's and the stock of Skelly in the middle 70's.

After the execution of the contract of October 4th (Exhibit A attached to the complaint) I discussed further with Messrs. Staples. Kluth and Williams the basis for exchange and the various factors which should be taken into consideration in determining the fairness of any basis.

I learned from C. H. Wright, President of Sunray, that he had been in communication with Mr. Skelly concerning the progress of the negotiations.

After the agreement of October 4th was signed, I was able to reach Mr. Skelly the next day and then told him what had been done and requested Mr. Skelly to call a meeting of the Board of Directors

of Mission to consider questions of a merger and advised him that Mr. Hadfield, Mr. Paul Getty's counsel, would be in Tulsa to consult with him as to matters which would have to be gone into in considering a possible merger. Mr. Skelly was definitely hostile over the telephone and gave me no definite answer to my request to call a meeting of the Board of Directors of Mission Corporation.

I proceeded to Tulsa in the middle of that week, arriving there on October 11th. I learned from Mr. Hadfield and Mr. Wright that Mr. Skelly was hostile in talking to them and had indicated a definite opposition to any merger or the consideration thereof. I understand he had asked to defer further discussions until my arrival in Tulsa. I met with Mr. Skelly on the morning of October 13th and the information I had received from Messrs. Hadfield and Wright was corroborated. Mr. Skelly was definitely hostile and indicated to me a complete lack of any disposition to give serious consideration to the working out of a merger.

On October 13th, after I saw Mr. Skelly, I was advised that because of Mr. Skelly's attitude it had been decided to eliminate [214] Skelly from the merger. The same business advantages could substantially be obtained without the inclusion of Skelly inasmuch as it would become a subsidiary of the merged company and its business activities could be integrated with the merged company.

A meeting of the Board of Directors of Mission had been called to be held on October 18th. Mr. Skelly had completely disregarded my request to

call an earlier meeting for the purpose of considering a merger, although I had endeavored to impress upon him the necessity for urgency inasmuch as one of the conditions to the agreement of October 4th was that the sale would have to be made by December 23, 1947, and the sale itself was was conditioned upon the merger. In the week of October 13th I endeavored to get Mr. Skelly to give notice to the directors that at the meeting called for October 18th consideration would be given to the possible merger, but he again failed to accede to this accede to this request. Because of Mr. Skelly's persistent failure to give the notice as President of Mission, it was finally necessary for three directors to give such notice as is permitted by the by-laws of the corporation. All of my attempts during the week of October 13th to enter into discussions with Mr. Skelly as to merger terms, etc., met with dilatory responses on his part. He continued to display an attitude of hostile objection to any merger and evidenced a persistence in refusing to consider the merits of the merger or to determining whether a ratio of six to one which was then being proposed by Sunray was a fair and equitable one for the stockholders of Mission. Meanwhile other directors of Mission had come to Tulsa and proceeded to make an exhaustive, extensive and intensive investigation into pertinent data to determine the advisability and feasibility of a merger and the fairness of the terms being proposed. I met with such directors and discussed many questions concerning the merger with them. Mr. Boal, the attorney for Mission, had received a copy of the proposed merger agree-

ment and went over the proposed terms of the merger with [215] a view to advising the directors and the corporation concerning all legal questions.

Mr. Hyden advised me, in effect, that inasmuch as he was an employee of Skelly Oil Company, working under Mr. Skelly, he could not oppose or vote against Mr. Skelly. It was suggested to Mr. Hyden that under the circumstances, in order to save himself embarrassment, he might resign as a director of Mission.

In advance of the meeting of October 18th the directors, other than Messrs. Skelly, Hyden and Boal, were in constant communication with each other. It was decided that Mr. Skelly was definitely hostile to a merger and would not give his sincere cooperation to a consideration of the proposed merger or merger terms; that in order to get a fair and expeditious consideration of the proposed merger it was essential to remove Mr. Skelly as President of Mission. Accordingly, at the meeting of October 18th he was removed and Mr. Staples was substituted as President.

While I was interested in the sale of the stock of the trust, I was also keenly conscious as an attorney and counselor-at-law that no merger should be considered or submitted to the stockholders unless the basis of exchange of the stock of the companies involved was fair and equitable to the stockholders of all of the corporations. I also realized that as a director of Mission I owed the same duty to each and every stockholder and that it was incumbent upon me not to advocate consideration of any merger that was not fair to all the stockholders.

At the time the proposed merger came before the Board, I did not vote for or against it for the reason that I thought it was better to err upon the side of caution and not vote, in view of my position as a trustee selling the stock held by the trust, although I did not believe, and do not believe, I was technically or legally disqualified. I had, however, satisfied myself before the meeting that the basis of exchange was fair, otherwise I would [216] not have been a party to the transaction.

I will not endeavor to set forth at length facts which were considered by me in concluding that the terms of the proposed merger were fair, as I understand they will be set forth in detail in the affidavits of Messrs. Kluth and Williams, which are to be filed and served.

/s/ THOMAS A. J. DOCKWEILER.

Subscribed and sworn to before me this 19th day of November, 1947.

[Seal] /s/ ELLEN WERTZ,
Notary Public in and for Said County and State.

My Commission Expires Sept. 29, 1950.

Service by copy admitted November 20, 1947.

/s/ WM. WOODBURN,
One of Attorneys for Plaintiff.

[Endorsed]: Filed Nov. 20, 1947. [217]

[Title of District Court and Cause.]

AFFIDAVIT OF GEORGE A. HAMMER

State of New York,
County of New York—ss.

George A. Hammer, residing at #1 Gracie Square, New York City, being duly sworn, deposes and says:

I am and have been engaged in the real estate business for the past twenty years. I have been a licensed real estate broker since 1931. I am at present associated as a vice president with the Charles F. Noyes Company, Inc., of #40 Wall Street, New York City.

My principal duty with the aforementioned company is to evaluate real estate, mainly located in the Borough of Manhattan in the City of New York. I am presently head of a division of the appraisal department of the Charles F. Noyes Company charged with the responsibility of appraising real estate involved in litigation and thus requiring expert testimony relating to their valuation.

In this capacity I have appraised in excess of $1,000,000,000 worth of property in the Borough of Manhattan. I have appraised for banks, insurance companies, railroads, department stores, industrial concerns, investors, trustees, executors, the City of New York, the State of New York, the United States Army, the United States Navy and the United States Department of Justice.

I have appraised real estate of many and diversified classifications. To mention those coming readily to mind: hotels, apartment houses, office buildings, loft buildings, theatres, cinemas, opera houses, bank buildings, factories, garages, gasoline stations, restaurant buildings, night clubs, coal yards, oil refineries, bottling plants, country clubs, town clubs, surf clubs and unimproved land. [218]

Since this affidavit of appraisal pertains to hotel property, it seems germaine to mention some of the hotels I have appraised in the past several years. They are: the McAlpin, Vanderbilt, Marguery, Barbizon Plaza, Wyndham, Hampshire House, Ritz Towers, Delmonico, Madison, Sherry Netherlands, Windemere, Marcy, Oliver Cromwell, Bancroft, Beacon, Stuyvesant, Warwick, Gotham, Wellington, Beverly Shelton, Belmont Plaza and several others.

The company with which I am associated as a vice president is the largest real estate brokerage firm in the City of New York. They manage, lease, sell and mortgage more real estate in dollar volume than any other real estate concern in the Metropolitan area.

I have at the request of Leve, Hecht, Hadfield & McAlpin made an appraisal of the Hotel Pierre, New York, N. Y.

This property located on the southeast corner of Fifth Avenue and East 61st Street has a plot area of approximately 27,000 square feet. Its dimensions are 100.5 on Fifth Avenue and 270 on East 61st Street. The building consists of a 41-

story, luxury type, fireproof hotel having a cubical content of approximately 6,500,000 cubic feet. The building was constructed in 1929-1930. It was planned by the architectural firm of Schultze & Weaver and built by George A. Fuller Company.

The building was originally built on leasehold ground, the land underlying the structure being owned at that time by the Gerry Estates, Inc. Under the original terms of this lease, the net ground rent over the first 21-year period of the lease averaged $355,000 and provided for two renewal options @ 5½% of the then appraised value of the land.

The owner of the leasehold and the promoter of the building venture was the Hotel Pierre, Inc., of which Charles Pierre, the famed restauranteur, was president. Among the prominent persons associated with the venture were: Walter P. Chrysler, Peter Freylinghusen, E. F. Hutton, Otto H. Kahn, Charles H. Sabin and Joseph P. Day.

The venture was partially financed through a first mortgage leasehold loan from S. W. Straus & Co. in the sum of $6,500,000. It was appraised in 1929 by Pease & Elliman, Inc., for $11,000,000 and by Cushman and Wakefield, Inc., for $11,060,000. Both of these firms enjoy an excellent reputation and carry on a large and important real estate business in New York City.

Due primarily to the depression, over financing, a burdensome lease and terrific competition engendered by an over-production of hotels in that era, this hotel was not a success until its ownership passed into stronger financial hands which was

almost coincidental with the end of the great depression and just prior to the war in Europe which later developed into World War II. [219]

In October, 1938, the Getty Realty Corporation purchased the land underlying this hotel subject to the lease thereon for the sum of $2,500,000. In December, 1939, the Getty Square Corp. became the owner of the building through legal proceedings resulting from a default on the part of the ownership of the building in relation to the rental required under the lease.

The Hotel Pierre enjoys a distinctive place among the better class hotels in New York City. Its suite and restaurant facilities offer a gracious type of living much sought after by many people of more than average means. In addition to which it is currently enjoying remarkable success as a transient hostelry and its rates and occupancy are on a level with the best in the City. During the year ending December, 1946, the profit of the Rooms Department was close to $1,000,000.

Its Food and Beverage Department is currently enjoying and for the past several years has enjoyed very marked success. This income media has been enhanced by the popularity of the famous Cotillion Room, Pierre Cafe and its newer and exceptionally smart Grill Room specializing in East Indian dishes. In 1946 the profit of the Food and Beverage Department was over $500,000.

It also enjoys a good income from commercial rentals and concessions. Last year this miscellaneous income amounted to almost $75,000.

The location of the property is ideal for the use to which it is being put. It enjoys a distinguished address, it is only a step from Central Park and is at the northerly end of the most fashionable and well known retail section in the entire world. Night clubs, theatres and all forms of amusement are within a short distance.

Before reaching my conclusion as to the value of the subject property, I gave consideration to all pertinent factors.

Among the elements given careful study by me in appraising this property were the following: its favorable location, the transportation facilities offered both locally and in relation to its out-of-town clientele, its excellent reputation and valuable good will, the value of the and underying the hotel as indicated by many sales of comparable and neighborhood properties, the excellence of its management, its superb condition, the popularity and profitable nature of its dining facilities, the desirability, income potentialities and actual earning power of its rooms and suites and the substantiality of the other miscellaneous income developed through its operation. I have also considered recent leases made in the vicinity of this property as well as data relating to mortgage financing and rates in comparable and competitive hotels. Thought also was given to the probable cost of replacing this structure in today's highly inflated building market. [220]

Primary weight in the formulation of my opinion of value was given to the recent earnings of the

property. I list below the net earnings of the property before interest, depreciation and income taxes for the past several years.

Calendar Year	Net Profit
1947	$479,676.88 (8 months)
1946	$663,556.41
1945	$483,535.07
1944	$508,356.33

It should be noted that the 1947 figures only reflect earnings for ⅔ of the calendar year. Assuming equal pro rata earnings for the balance of the year would indicate a net profit for 1947 of over $720,000. Averaging this estimated figure with the earnings of the three prior years indicates an average net earning power as if free and clear of close to $600,000.

After carefully weighing all the factors enumerated above together with others of less consequence, I determined the value of this property to be as follows:

Land	$1,000,000
Building	$4,500,000
Personality	$1,000,000
Total	$6,500,000

The following "breakdown" and comparison is made in extension of this appraisal.

(a) I have valued the land at $1,000,000 which represents a value of slightly over $37 per square foot. This compares with the City assessed valuation on the land of $1,470,000 indicating a unit value per square foot of almost $54. Appellate Division

of the Supreme Court of the State of New York recently reviewed the value of this property in a certiorari proceeding and found the value of the land to be the sum of $1,135,000 or at the rate of $42 per square foot.

(b) The value I have placed on this building is the sum of $4,500,000 which represents a value of 69c per cubic foot based on the building having a cubical content of 6,500,000 cubic feet. To reproduce this building new today would cost at least $1.25 per cubic foot. The building is now 17 years old, in excellent condition and exceptionally well maintained. A very considerable sum of money has been spent in betterments, improvements and alterations. Even if we allow, however, the usual 2% annual depreciation, the accumulated deterioration would only amount to 34%. Thus [221] the lowest replacement cost envisioned would be at the rate of 82½c per cubic foot.

(c) The value I have placed on the Personalty contained within this property is $1,000,000. This includes the value of the furniture in the rooms and suites, the linens, blankets, draperies and accessories. It also includes the furniture, silver, linen and equipment of the dining rooms and public spaces including the lobby. It also includes the office furniture and stationery of the hotel as well as the hotel's stock of wines and liquors, food, etc., both on the premises and in storage. Guidance in this respect was taken from the Harris, Kerr, Forster reports. Their report as of August 31st, 1947, indicates on their balance sheet (Exhibit A) the follow-

ing inventory assets: Food—$15,127.42; Beverages —$168,406.90; Furniture & Equipment (depreciated)—$575,260.30; Cafe Pierre (depreciated)—$13,111.51, and Cotillion Room (depreciated)—$42,-364.57; Total—$804,270.70. It must be borne in mind that the above items with the exception of Foods & Beverages which are carried at cost price (Considerably below retail value) have been subjected to rapid "book depreciation" consistent with good accounting procedure and to furnish the owners with an allowable deduction against income taxes. This book value, however, does not intend to convey the thought that the furniture and fixture of this hotel could be bought for their so-called depreciated value. The reverse is true. The cost of replacing those items today would easily exceed the $1,000,000 figure which I have allowed in this appraisal. I am not only familiar with the subject of furniture valuation as it relates to hotel property through my valuation work but I also frequently consult with experts specializing in this field. In support of my value of the personal property in this hotel, I wish to point out that the "contents" of this hotel are insured for $1,000,000.

(d) The valuation I have placed on the total asset incorporated in the Hotel Pierre is $6,500,000. Based on a projection of the 8-month statement of earnings for 1947 (Harris, Kerr, Forster Report) to cover the entire year, the estimated earnings of $720,000 would indicate a monetary return or profit on my value (on a free and clear basis) of 11%.

Based on the earnings for the calendar year 1946 ($663,556) the return would be 10% and finally based on the average earnings for the calendar years 1947 (as projected) 1946, 1945 and 1944 ($600,000) the profit would be 9¼%.

GEORGE A. HAMMER.

Sworn to before me this 17th day of November, 1947.

[Seal] JOSEPH K. MARONE,

Notary Public, Co. of New York, Residing in County of New York. N. Y. Co. Clk's No. 2091.

Commission Expires March 30, 1949.

Service by copy admitted November 20, 1947.

/s/ WM. WOODBURN,
One of Attorneys for
Plaintiff.

[Endorsed]: Filed Nov. 20, 1947. [222]

[Title of District Court and Cause.]

AFFIDAVIT OF EMIL KLUTH ON BEHALF OF DEFENDANT

State of California,
County of Los Angeles—ss.

Emil Kluth, being duly sworn, deposes and says:

I am a petroleum geologist associated with Pacific Western Oil Corporation as a Vice President. I have been a member of the American Association of Petroleum Geologists since 1928. During the past year from 1945 to 1946 I was Chairman of the Con-

servation Committee of California Oil Producers. I have been engaged as an actively practicing petroleum geologist since 1911. My work as a practicing geologist has been in connection with oil companies in the Mid-Continent Area, the Rocky Mountain Area, and California.

I entered the service of the Getty corporations as a geologist in October of 1916, in Oklahoma. I was transferred to [223] California in January of 1923. I have been a Vice President of Pacific Western Oil Corporation since 1932. I have been a Vice President and Director of Mission Corporation since May of 1937 and a Director of Skelly Oil Company since July of 1937.

In March, 1947, I was advised that the Getty interests were contemplating a sale of their Pacific Western Oil Corporation stock holdings to Tide Water Associated Oil Company at $68.00 per share, and conferred with Tide Water officials, furnishing them with such information as they desired in connection with the proposed sale.

In April, 1947, I also learned that Sunray Oil Corporation might also be interested in acquiring the Getty interests in Pacific Western Oil Corporation stock.

In July, 1947, I learned that the Tide Water proposed sale was off as the Anti-Trust Division would not give a clearance and that more active negotiations were under way for Sunray Oil Corporation to acquire the stock of the Getty interests.

From July, 1947, to the beginning of October, 1947, the question of a merger of Pacific Western Oil Corporation, Mission Corporation and Skelly Oil

Company with Sunray Oil Corporation was under constant discussion among Messrs. Staples, Williams and myself, and occasionally with Mr. Dockweiler. On October 6, 1947, Mr. Staples advised me that Paul Getty and the Getty Trust had entered into a contract with Sunray Oil Corporation for the sale of Pacific Western stock, conditioned upon a satisfactory merger being worked out by the respective managements.

On October 8, 1947, Mr. Dockweiler advised me that the consideration of the merger was to come before the Mission Corporation Board of Directors at a meeting on October 18, 1947, unless an earlier meeting were called for such purpose.

On October 14, 1947, Mr. Staples advised me that in all probability Sunray Oil Corporation was going to make a proposal [224] to the Mission Directors for a merger on the basis of six (6) shares for one (1), and that Skelly Oil Company had been dropped out of the proposed merger. I immediately started gathering such information as I could concerning the various companies and making an analysis of all of the corporations. At that time I received the 1946 Annual Report of Sunray Oil Corporation from Mr. Staples. I proceeded to Tulsa, Oklahoma, and arrived there on October 16, 1947. I visited the offices of Sunray Oil Corporation and there gathered such information as I could concerning Sunray Oil Corporation. Mr. Staples, Mr. Williams and myself commenced an investigation of all the facts and data each of us were able to obtain and continued to make an intensive analysis of the various

factors we considered important in order to pass upon the proposal which was to come before us at the meeting of October 18, 1947.

In making my analysis as to whether the proposal would be fair to the Mission stockholders and desirable from their viewpoint, I considered many factors, including among them the following: The assets, properties, production, earnings, stock market prices, dividends, reserve estimates, and other pertinent data as to Pacific Western Oil Corporation, Mission Corporation, Skelly Oil Company and Sunray Oil Corporation. I also considered stock market prices of Tide Water Associated Oil Company. After a full and complete analysis by myself and a discussion with Messrs. Williams, Staples and Boal, and a review of the conclusions of those gentlemen and more particularly the computations and data which had been gathered by Mr. Williams, I concluded that the merger terms to be proposed were fair and equitable to the Mission stockholders and that the merger upon such terms would be desirable from the viewpoint of the Mission stockholders, and that such merger should be submitted to such stockholders for their consideration.

A summary of some of the facts which I considered and the tabulations I was able to prepare from such facts based on varying [225] theories, all of which supported my conclusions, follows:

1. Comparative Table of Stock Values:

October 18, 1947 (Week ending close), PW, 57; Mission, 54¼; Sunray, 11⅜ Skelly, 93½; Skelly, 93½; TW, 24⅞.

	Average Between High and Low by Quarters							
	Oct.-Nov.-Dec. 1945	Jan.-Mar. 1946	April-June 1946	July-Sept. 1946	Oct.-Dec. 1946	Jan.-Mar. 1947	April-June 1947	July Sept. 1947
Sunray	7½	8½	11½	10½	8¼	9	8½	11¼
PW	28	22½	32	25	21	25	32½	41½
Mission	31½	33	40	35½	32	31½	34	40½
Skelly	56½	63	78	69½	65	68½	69½	79½
Tide Water	21½	20½	23	21	19	19	19½	21

9 Mo. Average 1947—Sunray 9½; PW 32; MCO 35; Skelly 72½; TW 20

Ratio Sunray to Mission—1 to 3.2 (on stock market quotation) (9 month stock values).

2. Comparative Table of Dividends:

	Pacific Western	Mission	Skelly	Sunray	Tide Water
1946	.50	1.45	2.00	.30	1.00
1947	None	1.50	2.50	.50	1.05

1947 Dividend Ratio—Sunray to Mission—1 to 3

3. Comparative Table of Earnings:

Pacific Western merged with George F. Getty, Inc. in 1946. Sunray Oil Corporation merged with Transwestern in 1946.

Pacific Western—First 9 months of 1947		
Operating profit	1,031,559	
Other profit	77,046	
Subsidiaries	405,267	
Dividend*	1,177,094	
*641,808 MCO × ¾ of $1.50		
577,854TW × ¾ of $1.05	2,690,966	
Taxes	50,000	
Net	2,640,966	= 1.93 for 9 months
	1,371,730	
Mission Corporation—First 9 months of 1947		
(A) Including Skelly dividends only		
Operating profit	109,511	
Expenses	64,249	
	45,262	
Interest earned	2,313	
	47,575	
Dividend*	2,152,135	
*1,345,593 TW × ¾ of $1.05		
582,657 Skelly × ¾ of $2.50	2,199,710	
Taxes	106,000	
Net	2,093,710	= 1.52 for 9 months
	1,379,545	

(B) Earnings of MCO based on 60% of earnings of Skelly and dividend on TW plus other earning and expenses

First 9 months of 1947

a) From operation of Habiger	45,262
Interest	2,313
b) From Dividend of TW 1,345,593 shares at 9/12 of $1.05	1,059,654
c) Earnings of Skelly 582,657 shares at $8.20*	4,777,787
	5,885,016
Taxes	106,000
	5,779,016
1,379,545 shares	4.25

*Skelly 9 months earnings..... $13.70
60% interest of MCO..... 8.20

Skelly Oil Company—First 9 months of 1947
Net income 9 months 1947....13,448,167=13.70 for 9 months

981,348

Sunray Oil Corporation—First 8 months of 1947
Net income 8 months 1947..... 7,002,525=1.42 for 8 months

4,933,812
1.42 plus 1/8=1.60 for 9 months

Earning Ratio for first 9 months of 1947:

PW, 1.93 MCO, 1.52* Skelly, 13.70 Sunray, 1.60

Ratio—Sunray to Mission—1 to 1 on earnings.

*Ratio—Sunray to Mission—1 to 2.7 (by including Skelly proportionate earnings in place of dividend)

*MCO $4.25 based on including Skelly earnings in place of Skelly dividend.

4. Comparative Evaluation of Underlying Assets:

In making this evaluation I included the oil properties upon the basis of the practical rule-of-thumb used widely and generally accepted in the oil business of $3000 for each barrel of daily net production in California, and $2500 for each barrel of daily net settled production in the Mid-Continent and $2000 per barrel of daily relative flush production in the Mid-Continent. This rule-of-thumb is used by practical oil men in determining value of oil producing properties for purposes of buying and selling. In my opinion it is a fair yard-stick for comparing relative values of producing properties:

Pacific Western—Sept. 30, 1947

Total Assets			32,853,149
Liabilities			1,567,947
Net Assets (other than capital stock and surplus)			31,285,202
	Adjustments		
MCO	641,808-9,947,084 (Book)		
Valued at $40.		Apprec.	15,725,236
(3rd Q Aver.)	25,672,320		
TW	577,854-3,927,006 (Book)		
Valued at $21.		Apprec.	8,207,928
(3rd Q. Aver.)	12,134,934		
Hotel	3,358,615 (Book)	Apprec.	2,641,385
Value—present	6,000,000		
Oil Properties	10,704,945 (Book)		
10,576 net at		Apprec.	21,023,055
$3000 per bbl	31,728,000		
Net Assets (other than capital stock and surplus)			79,882,806
Shares			1,371,730
PW per Share			58.00

As a controlling factor of MCO and Skelly, this stock is worth a good deal more but not to minority stockholders as stocks always sell at less than their proportionate part of net assets.

Mission Corporation—Sept. 30, 1947

Total Assets			20,066,792
Liabilities			151,319
Net Assets (other than capital stock and surplus)			19,915,473
TW 1,345,593-13,938,216 (Book) Valued at $21.00 (3rd Q Aver.) 28,257,453	Apprec.		14,319,237
Skelly 582,657- 4,250,289 (Book) Valued at $80 (3rd Q Aver.) 46,612,246	Apprec.		42,361,957
Oil Properties 117,439 (Book) 221 bbls at $2500 per bbl. 550,250	Apprec.		432,811
Total Assets (other than capital stock and surplus)			77,029,478
Shares			1,379,545
Mission per share			55.50

Fifty-five dollars and 50 cents is a fair value for it holds the controlling interest of Skelly Oil Company, but would not be worth that much to a minority stockholder as stocks always sell at less than their proportionate part of evaluated assets.

Skelly Oil Company—Sept. 30, 1947

Assets			118,527,428
Liabilities (Current)		14,750,407	
(Funded)		15,600,000	30,350,401
Net Assets (other than capital stock and surplus)			88,177,027
Adjustments			
Producing property and Undev. property		54,015,209	(Book)
40,000 bbl at 2500 per bbl	100,000,000		
14,180 bbl at 2000 per bbl	28,360,000		
63,000,000 from undev. reserves at 50c	31,500,000		
Undev. acreage	8,500,000		144,345,791
1500 Billion Cu. ft. dry gas	30,000,000		
	198,360,000		
Crude pipe lines no adjustment			
Refining—Nat. Gas Plant		12,224,848	(Book)
Gas Plant	8,600,000		
Refinery	15,000,000		
Skellgas	8,600,000		19,975,152
	32,200,000		
Marketing no adjustment			
Other Assets no adjustment			
Total Assets (other than capital stock and surplus)			252,497,970
Shares			981,348
Skelly per share			256.00

As Skelly Oil Co. does not control any substantial producing subsidiaries, therefore this value should be considerably discounted to get the fair market value of this stock. Thirty per cent discount equals the market value of $180.00.

Sunray Oil Corporation

Total Assets			96,979,952
Liabilities			35,425,318
Preferred Stock			26,189,360
Net Assets (other than capital stock and surplus)			35,365,274
Adjustments			
Producing properties		45,429,292 (Book)	
34,000 at 2500 per bbl	102,000,000		
30,000,000 from undev. at 50c	15,000,000		
600 Billion cu. ft. dry gas	12,000,000		
Undev. acreage	5,700,000		
Lines	90,700		96,752,085
Tools	1,698,539		
Work in progress	2,692,138		
Ref. 6 x profit	20,000,000		
	142,181,377		
Total Assets (other than capital stock and surplus)			132,117,359
Shares			4,923,646
Sunray per share			26.50

The Sunray Oil Corp. does not control any substantial producing subsidiaries therefore this value must be considerably discounted to get the fair market value. Thirty per cent discount equals the market value of $19.00

Ratio of Assets

Pacific Western $58.00; Mission $55.50; Skelly $180.00; Sunray $19.00
Asset Ratio—Sunray to Mission—1 to 3 on evaluated assets.

Resume

Ratio—Sunray to Mission

Stock quotations	1. to 3.2	(1 to 2)	including Mission's Equity
Dividends	1 to 3		in Skelly earnings
Earnings	1 to 1	(1 to 5)	on Skelly stock at $180
Evaluation	1 to 3		a share.

The comparative evaluations set forth in paragraph 4 are upon the basis of the market values of securities held by Pacific Western Oil Corporation and Mission Corporation. In my opinion this is the only fair basis of evaluation for the ordinary minority stockholders inasmuch as the ordinary stockholder has no way of realizing the value of the assets underlying such securities. I [231] made a further evaluation of Mission Corporation and Pacific Western for informational purposes however, taking the values of the assets underlying the securities and set forth a tabulation upon this basis, taking the evaluations from the above tables of the underlying values:

Sunray at $19.00 (from Sunray evaluation)
Skelly at 180.00 (from Skelly evaluation)
TW at 21.00 (TW 3rd Q. Aver.)
Tabulation on this basis is as follows:

A.	Mission Corporation—Sept. 30, 1947	
	Current assets	1,760,847
	Fixed assets	117,439
	Add Habiger excess value (above book value)	432,811
	Investments:	
	1,345,593 TW at $21	28,257,453
	582,657 Skelly at $180	104,878,260
	Total Assets	135,446,810
	Total Liabilities	151,319
	Net assets (other than capital stock and surplus)	135,295,491
	Shares	1,379,545
	Mission per share	98.00
	Ratio—Sunray to Mission—1 to 5	

B. Pacific Western—Sept. 30, 1947

Assets	
Current assets	5,046,239
Investments:	
641,808 MCO at $98 (from previous schedule)	62,891,184
577,854 TW at $21 (3rd Q Aver.)	12,134,934
Oil properties	31,728,000
Hotel	6,000,000
Organization costs	114,245
Prepaid Item	415,972
Total Assets	118,330,574
Liabilities	
Current liabilities	1,567,947
Net Assets (other than capital stock and surplus)	116,762,627
Shares	1,371,730
PW per share (on breakdown of MCO $98, Skelly at $180, TW at $21)	85.00

/s/ EMIL KLUTH.

Service admitted by copy November 20, 1947.

/s/ WM. WOODBURN,
One of Attorneys for
Plaintiff.

Subscribed and sworn to before me this 19th day of November, 1947.

[Seal] /s/ DOROTHY HENRY,
Notary Public in and for Said
County and State.

My Commission Expires May 29, 1949.

[Endorsed]: Filed Nov. 20, 1947. [232]

In the United States District Court
for the District of Nevada

No. 669—Civil

WILLIAM G. SKELLY,

Plaintiff,

vs.

MISSION CORPORATION, a Corporation,

Defendant,

SUNRAY OIL CORPORATION, a Corporation,

Applicant for Intervention.

William L. Hanaway, Springmeyer & Thompson, Attorneys for Intervener.

Hawkins, Rhodes & Hawkins, Lester D. Summerfield, Tompkins, Boal & Tompkins, Attorneys for Defendant, Mission Corporation.

AFFIDAVIT OF RAYMOND F. KRAVIS

State of Nevada,
County of Washoe—ss.

Raymond F. Kravis, being duly sworn, deposes and says:

I am a graduate mining engineer specializing in investigation, evaluation and appraisal of oil and gas properties and assets and reserves. I graduated from Lehigh University in 1924 with a degree in mining engineering. From that date to 1935 I was continuously engaged in petroleum evaluation and appraisal for part of the time with W. O. Ligon & Company and for part of the time with Samuel

J. Caudill, both consulting engineers and geologists of Tulsa, Oklahoma. In 1935 I opened my own office as a consultant and have continued actively in the profession to date. [233]

My work has consisted of surveys and appraisals of oil and gas properties for purposes of estimating oil and gas reserves and determining values, for depletion and depreciation; and for purposes of purchase and sale of oil and gas properties and companies, for proposed consolidations and mergers of oil companies, and in liquidation proceedings. I have been retained and have made appraisal reports of oil and gas producing properties for some of the outstanding oil producing and financial institutions in this country including the Thomas B. Slick Estate, Anderson Pritchard Oil Corporation, Standard Oil of Ohio, Warren Petroleum Corporation, Texas Gulf Producing Company, Fohs Oil Company, National Refining Company, Darby Oil and Refining Company, Sunray Oil Corporation, Transwestern Oil Company, Kerr, McGee Oil Industries, Inc., First National Bank of Chicago, Harris Trust and Savings Bank of Chicago, Empire Trust Company of New York, First National Bank and Trust Company of Tulsa, Eastman, Dillon & Company of New York, Merrill Lynch, Fenner & Bean of New York; Bear, Stearns & Company of New York and many others.

I have also testified as an expert for the United States Government in tax proceedings of the Treasury Department in oil company liquidations.

When Darby Petroleum Corporation was purchased by Sunray Oil Corporation I made reports of Sunray and Darby's properties, assets and oil reserves for the Sunray Oil Corporation and at the end of each year I have estimated and appraised the oil reserves of Sunray for purposes of depletion and depreciation computations for required financial reports.

In September of 1947 I was engaged by Sunray Oil Corporation [234] to make a preliminary estimate of the properties, assets and oil reserves of Sunray and to report on the approximate relative values of Sunray, Mission Corporation and Pacific Western Oil Corporations. These reports were made to check other experts engaged, representing primarily bankers and other interests, to assure the directors of Sunray Oil Corporation that a merger would be to the best interests of Sunray stockholders.

As to Sunray Oil Corporation

I calculated and appraised the oil and gas reserves as of September 31, 1947, for this company by the generally accepted and detailed methods of appraisal used by other competent engineers, geologists and petroleum experts doing this work. After giving full consideration to the quality of the oil reserves, the price of various qualities of oil on that date, operations and overhead expenses and future development costs I concluded that the fair and reasonable market value of Sunray's oil on September 31, 1947, to be 70c per barrel for the oil and 2c per M.C.F. (million cubic feet of gas).

I concluded that the aggregate total proved producing and proved undeveloped oil and gas reserves for Sunray Oil Corporation were 177,500,000 barrels of oil and 600,000,000 M.C.F.'s of gas.

At 70c per barrel for oil and 2c per M.C.F. for gas the monetary value of oil and gas reserves as above defined owned by Sunray Oil Corporation on September 31, 1947, were:

Oil Reserves	$124,250,000.00
Gas Reserves	12,000,000.00
Total	$136,250,000.00

In addition other assets of Sunray were found to be, [235] subject to possible minor adjustments, as follows:

Undeveloped leases and realty	$ 5,515,077.00
Other investments	793,771.00
Work in progress	2,919,905.00
Refinery and other equipment	2,500,000.00
Net quick assets	9,319,267.00
Drilling tools, trucks, real estate, etc	1,000,000.00
Total oil & gas reserves (carried over)	136,250,000.00
Total	$158,298,019.00

Liabilities

Deferred and long term debt	$ 29,119,667.00
Provision for additional federal tax	537,670.00
Preferred stock	26,189,360.00
Total liabilities	$ 55,866,697.00

The net worth of Sunray Oil Corporation is the difference between these two figures or $102,451,-322.00, which divided by the number of shares of stock outstanding represent a worth of $20.88 per share.

As to Pacific Western Oil Corporation

In appraising the value of this company and its properties, assets, oil and gas reserves I made use of all published data and other records necessary to form a judgment of the monetary value of such properties and assets and I found by these methods that as of September 31, 1947, the respective values were: Oil reserve, 42,000,000 barrels at the estimated value of 65c per barrel for the quality of oil in these fields. I calculated the net worth of the company on the following asset values:

Oil reserves at 65c per barrel	$ 27,300,000.00
Gas reserves	200,000.00
Undeveloped lease holds and fee lands	3,400,000.00
Net current assets	3,363,427.00
Pierre Hotel New York	6,000,000.00
Tidewater stock @ $25.00 less tax	11,400,000.00
Mission & Skelly Oil Stock	76,432,915.00
Total net assets of Pacific Western Oil Corporation	$128,096,342.00
Total cost to Sunray	93,300,000.00
Excess value of Pacific Western Oil Corporation over cost to Sunray	$ 34,796,342.00

As to Mission Corporation

Mission Corporation is largely a holding company but I have evaluated its properties as nearly as possible on the same basis used for evaluating the assets of Pacific Western Oil Corporation and Sunray Oil Corporation particularly insofar as Mission ownership in Skelly Oil Corporation is concerned, that is using its intrinsic worth, rather than the

New York Stock Exchange value of the few shares traded in daily because such does not represent or fix the true value of the Skelly properties.

The underlying assets, not including the Skelly stock, as of August 31, 1947, are as follows:

Current assets	$1,790,533.00
Tidewater stock @ $25.00 less tax[1]	28,700,000.00
Oil properties	500,000.00
	30,990,533.00
Liabilities (before adjustment)	188,865.00
Total	$ 30,801,668.00
Value of underlying assets of Skelly Oil Corporation reduced to Mission Corporation's net interest (59.37%)[2]	132,845,796.00
Total Net Worth Mission Oil Corporation.. or $119.09 per share.	$163,647,464.00

[1]Tidewater stock has been evaluated on the basis of the price which Sunray has contracted to sell it.

[2]The underlying asset value of Skelly Oil Corporation is based on its intrinsic value and not on the stock exchange selling price of its stock.

After the purchase of Pacific Western stock by Sunray and including its properties and Sunray's net interest in the underlying assets of Skelly Oil Corporation through ownership of Pacific Western as set forth above, Sunray Oil Corporation common stock would have a present value of $28.00 per share.

On the basis of the respective value of the net worth of Sunray stock after the purchase of Pacific Western common stock, and the value of the net

worth of Mission Corporation their exchange ratio of 4.3 shares of Sunray for one of Mission would be mathematically proper. Sunray has offered six shares of its stock, after the purchase of Pacific Western stock, for each share of Mission Corporation stock at the time of the consummation of the merger and in my opinion this is an imminently fair ratio of exchange.

/s/ RAYMOND F. KRAVIS.

Subscribed and sworn to before me this 20th day of November, 1947.

[Seal] /s/ BRUCE R. THOMPSON,
Notary Public.

Service, by copy hereby is admitted this 21st day of November, 1947.

/s/ JOHN P. THATCHER,
Attorney for Plaintiff.

[Endorsed]: Filed Nov. 21, 1947. [238]

[Title of District Court and Cause.]

AFFIDAVIT OF J. KROUPA

State of Nevada,
County of Washoe—ss.

J. Kroupa, being first duly sworn, deposes and says:

I am Manager of the Stock Records Department of Mission Corporation and have been duly appointed one of the Inspectors of Elections for the meeting of stockholders of Mission Corporation

called to be held on December 6, 1947. I am in charge of receiving and tabulating all proxies to be voted at said meeting.

Up to November 20, 1947, I have received proxies from 5739 stockholders owning a total of 98,397 shares of stock of Mission Corporation. Of these shares received, 5564 stockholders owning 89,698 shares have voted in favor of the proposed merger and 175 stockholders owning 8,699 shares have voted against the merger.

In Witness Whereof, I have hereunto set my signature [239] this 21st day of November, 1947.

/s/ J. KROUPA.

Subscribed and sworn to before me this 21st day of November, 1947.

[Seal] R. Z. HAWKINS,

Notary Public in and for the County and State Aforesaid.

My commission expires November 23, 1949.

Service admitted Nov. 21, 1947.

JOHN P. THATCHER.

[Endorsed]: Filed Nov. 21, 1947.

No. 11809

United States
Circuit Court of Appeals
For the Ninth Circuit.

MISSION CORPORATION, a corporation,

Appellant,

vs.

WILLIAM G. SKELLY,

Appellee.

Transcript of Record

IN FOUR VOLUMES

VOLUME II

Pages 259 to 557

Upon Appeal from the District Court of the United States for the District of Nevada

Rotary Colorprint, 870 Brannan Street, San Francisco 3-12-48—70

No. 11809

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IN FOUR VOLUMES

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Pages 259 to 557

Upon Appeal from the District Court of the United States for the District of Nevada

[Title of District Court and Cause.]

AFFIDAVIT OF CHARLES F. KRUG

State of Nevada,
County of Washoe—ss.

Charles F. Krug, being first duly sworn, deposes and says:

I was designated by Mr. David T. Staples, president of Mission Corporation, to take charge of mailing the notice of meeting and proxy statement relating to the meeting of stockholders of the Corporation called to be held on December 6, 1947, for the purpose of considering and taking action on a proposed merger agreement.

Mailing of such material commenced on November 12, 1947, and was completed on November 14, 1947. Such material was sent by regular second-class mail from New York to all the stockholders who reside at various points throughout the United States.

In Witness Whereof, I have hereunto set my signature [241] this 21st day of November, 1947.

/s/ CHARLES F. KRUG.

Subscribed and sworn to before me this 21st day of November, 1947.

[Seal] R. Z. HAWKINS,
Notary Public in and for the County and State Aforesaid.

My commission expires Nov. 23, 1949.

Service admitted Nov. 21, 1947.

/s/ JOHN P. THATCHER.

[Endorsed]: Filed Nov. 21, 1947. [242]

[Title of District Court and Cause.]

AFFIDAVIT OF CALEB S. LAYTON

State of Delaware,
New Castle County—ss.

Be It Remembered, that on this 18th day of November, A.D. 1947, personally appeared before me, the subscribed, a Notary Public in and for the State and County aforesaid, Caleb S. Layton, who, being qualified by me in due form of law, did depose and say:

I am a member of the Bar, practicing in the City of Wilmington, Delaware, and am admitted to practice in all the Courts of Delaware, including the District Court of the United States for the District of Delaware, and am also admitted to practice in the Supreme Court of the United States. I was admitted to the Bar in the year 1910 and am a member of the firm of Richards, Layton & Finger, 4072 du Pont Building, Wilmington, Delaware.

I have in my practice had extensive experience with the Delaware Corporation Law for a period of over thirty years, have been counsel in numerous causes involving [243] the interpretation of the Delaware Corporation Law and have been for many years, and still am, called upon very frequently to give opinions upon the meaning of the various provisions of the said Statute. For a period of several years I was a member of the Corporation Committee of the New Castle County Bar Association which had charge of Amendments to the

General Corporation Law of this State and their presentation to the General Assembly of this State and subsequently became Chairman of said Committee and continued as such Chairman for a period of at least eight years. This work involved the drafting of Amendments to the General Corporation Law, the submission of them to the Bar Association and, upon receiving the approval of the Bar Association, the introduction of appropriate Bills into the General Assembly and the explanation of the purposes of the Amendments before joint Sessions of the appropriate Committees and explanations, likewise, before the two Houses of the General Assembly. I was chairman of the Corporation Committee when the substantial revision of the Delaware Corporation Law was made in the year 1927 and have from time to time been a member of the Corporation Committee of the Delaware State Bar Association after its formation and was a member of the Committee for the 1947 Session of the General Assembly. I have been called upon to testify numerous times in Courts of other jurisdictions with respect to the proper construction of the provisions of the Delaware Corporation Law involved in such cases.

I have read the complaint in the above stated cause and I have also studied the Agreement of Merger [244] dated October 18, 1947, between Sunray Oil Corporation, Pacific Western Oil Corporation and Mission Corporation and I have also studied the notice of meeting and proxy statement of Sunray Oil Corporation to which the said Merger

Agreement is attached as Exhibit A. I have also studied the notice of meeting and proxy statement of Mission Corporation to which the Agreement of Merger is likewise attached as Exhibit A. I have also examined the letters to Stockholders, dated November 6, 1947, of Mission Corporation, Pacific Western Oil Corporation and Sunray Oil Corporation, the latter letter being addressed to Stockholders of Pacific Western Oil Corporation. I have examined with care the averments of Paragraph XV of the above complaint, especially in so far as the contentions therein stated may be directed to the interpretation and meaning of the Corporation Law of this State.

Sub-paragraph (b) of Paragraph XV of the complaint avers that the Agreement of Merger states only a part of the terms and conditions of the merger and the mode of carrying the same into effect. I, of course, do not assume to deal with this averment in so far as it may involve the meaning of the Nevada Corporation Law. I assume, however, that it may be contended that the objection may likewise apply to the Merger Agreement in respect of Sunray Oil Corporation and Pacific Western Oil Corporation, which are incorporated under the laws of the State of Delaware.

After a careful examination of the Agreement of Merger and of the proxy statements I am of the opinion that this objection is without substance so far as the [245] Delaware Corporation Law is concerned. Perhaps a statement of the general purpose of Section 59 of the Delaware Corporation

Law, which confers the power of merger or consolidation, may be helpful. Upon an examination of the third paragraph of Section 59, which is the paragraph conferring power upon Delaware corporations to consolidate or merge with foreign corporations, it will be observed that the provisions of this paragraph are substantially the same as the provisions relating to merger of Delaware corporations alone. The statute is a broad and comprehensive one and essentially contemplates the coalescence of the constitutent corporations into the resultant or surviving corporation. It has been held in this State that every merger involves a sale of assets.

> Argenbright v. Phoenix Finance Company, 21 Del. Ch. 288, 292.

Our Supreme Court has held that the statute is to receive a liberal construction. In Federal United Corporation v. Havender, 11 Atl. (2d) 331, at page 338, our Supreme Court said:

> "The Catholic quality of the language of the merger provisions of the law negatives a narrow or technical construction if the purpose for which they were enacted is to be accomplished."

The statute contemplates the absorption of the corporate being as well as corporate assets into the corporation surviving the merger. Under Section 60 of the Delaware Corporation Law the separate existence of the constituent corporations, except the corporation surviving the merger, ceases upon the

effective date of the Merger Agreement and I assume that the same thing may be true with respect to Mission Corporation, a corporation of the State of Nevada. [246]

Sub-paragraph (b) of Paragraph XV of the complaint above referred to is not clear as to its exact meaning, but I assume that the objection may be made that the Agreement of Merger is deficient in that it fails to set forth the matters fully explained in the proxy statement relating to the purchase of the Getty stock in Pacific Western by Sunray and also the sale by Sunray of Tide Waters' stock to Tide Water. Under the Delaware Law neither of these transactions is necessary to be stated in an Agreement of Merger under Section 59. The circumstance that the acquisition by Sunray of the Pacific Western shares held by the Gettys may be a condition precedent to the accomplishment of the merger does not make it an essential part of an Agreement of Merger under Section 59 or one of the "terms and conditions of the consolidation or merger." These terms and conditions relate only to the essential provisions dealing with the transfer of the assets which are to fall within the Merger Agreement and may be illustrated by the circumstance that it is not unusual in a merger under Delaware Law for one of the corporations to transfer a portion of its assets before the merger becomes effective so that only the remaining assets of the corporation will fall within the terms of the Merger Agreement. The

sale of the shares of stock owned by the Gettys to Sunray immediately prior to the Agreement of Merger becoming effective cannot, in my opinion, be one of the terms and conditions of the Merger Agreement. It may well be a condition precedent to the accomplishment of the merger and this is stated explicitly in Article VI, Sub-paragraph 4 of the Agreement of Merger. [247]

A somewhat analogous situation existed in the sale of the assets of Postal Telegraph, Inc., to Western Union Telegraph Company, shown in the case of Goldman v. Postal Telegraph, Inc., in the District Court of the United States, District of Delaware, 52 Fed. Supp. 763. In that case a specific Amendment to the Certificate of Incorporation of Postal Telegraph, Inc., was adopted, defining the rights of the Preferred Stock of Postal in the event of the sale of Postal assets to Western Union. It was objected that Postal could not agree to sell its assets conditioned upon this Amendment to its Certificate of Incorporation, but the Court held that this contention was without merit.

In Sub-paragraph (c) of Paragraph XV of the above complaint it is objected that under the Delaware Law the stock of the constituent corporations must be exchanged for shares or other securities of the surviving corporation and that the Delaware Law does not permit the payment of cash for stock of one of the constituent corporations. I assume that this averment is addressed to the purchase by Sunray of Pacific Western stock owned

by the Gettys. The objection, in my opinion, is without substance because, as above stated, the fact that the acquisition of this stock may be a condition precedent to the accomplishment of the merger does not bring the stock within the provision relating to the conversion of the constituent corporations' stock into the shares or other securities of the corporation surviving the merger. It is obvious from the facts stated in the proxy statement that the Getty shares in Pacific Western will be owned by Sunray immediately prior to the Agreement of Merger becoming effective [248] and it likewise appears from Article IV (b) that all rights with respect to these shares will cease and the certificates shall be cancelled and no shares of the surviving corporation be issued in respect thereof. In consequence the Getty shares in Pacific Western could not possibly under the Delaware Law and the terms of the Merger Agreement be converted into shares of Sunray, the surviving corporation. It is possible that the objection stated in Sub-Paragraph (c) may relate to the provisions of Article IV (e) of the Agreement of Merger, dealing with the mechanics of fractional interests in shares of the constituent corporation. This subparagraph, as is quite usual, provides that no fractional shares of 1947 Prior Preferred Stock of Sunray shall be issued and it provides further that Sunray may at its election pay to the holder of such fraction, in cash, the fraction's value of $100, or the corporation may issue scrip certificates

convertible into full shares upon presentation of the necessary aggregate of the scrip certificates. This is not an unusual provision to be inserted in a Merger Agreement under Section 59 of the Delaware Law and does not, in my opinion, contravene the provision concerning the conversion of shares of the constituent corporations, but is merely one of the details or provisions which is deemed necessary or proper to be inserted in the Merger Agreement. As above stated, it is a matter of mechanics only for the convenience of the corporation and while the question has never been passed upon by the Courts of this State, I am of the same opinion as I have previously expressed in other cases that such provision is not in violation of [248] the provisions of Section 59. In any event the provisions are in the alternative and the stockholder owning a fraction of a share cannot demand payment therefor in cash; it is entirely at the election of the corporation whether to pay cash or to issue a scrip certificate. The provision for the issuance of a scrip certificate for a fraction of a share at the election of the corporation would obviate any possible objection such as may be intended to be asserted in Sub-Paragraph (c) of the complaint referred to.

In Sub-Paragraph (d) of Paragraph XV of the complaint it is averred that the defendant's stock in Tide Water is a part of the merger plan, is not stated in the Agreement of Merger and constitutes a partial liquidation of Mission Cor-

poration for the benefit of Pacific Western and its stockholders. Again, this objection shows a misconception of the meaning of the Delaware Law. Upon the effective date of the Agreement of Merger the shares of Tide Water owned by Pacific Western and Mission Corporation will become the property of Sunray. Mission will not then own the shares; they will be an asset of Sunray. Obviously these shares in Tide Water can be nothing more than an asset which Sunray will acquire as a result of the merger, similar to any other asset which may be owned by Mission or Pacific Western prior to the effective date of the Merger Agreement. They will be a part of the property which will vest in the surviving corporation under the provisions of Article VI of the Merger Agreement.

I assume that under the Nevada Law Mission Corporation, at least as a separate corporation, will cease [250] to exist when the Agreement of Merger becomes effective by proper filing and recording. It may well be that the sale of the Tide Water shares will follow the accomplishment of the merger and it likewise may very well be that the sale of these shares as a matter of financing may be necessary or advisable in connection with the acquisition of the Getty shares in Pacific Western, yet such sale does not thereby become one of the terms and conditions of the merger which is necessary to be set forth under the provisions of Section 59 of the Delaware Corporation Law. Sunray, as a resultant corporation under the provisions of

Sub-Paragraphs 10 and 18 of Paragraph Third of its Amended Certificate of Incorporation, being Article 11 of the Merger Agreement, will have power to dispose of the Tide Water stock in the same way that it will have power to dispose of any other asset of the corporation. In no sense can the sale of these shares be deemed a liquidation of Mission Corporation because Mission Corporation will not be the owner of the shares and would have no power to dispose of them. The provision for the sale of the shares of Tide Water is no different from provisions which are contained in other Agreements of Merger looking to the sale of certain assets to be acquired as a result of the merger which the corporation may not desire or may not be permitted to retain. I have been informed that one of the principal reasons for the sale of the Tide Water Stock is an objection raised by the Department of Justice to its retention by Sunray.

In Sub-Paragraph (e) of Paramount XV of the complaint it is objected that the stockholders of Pacific Western [251] and Pacific Western as a stockholder of Mission will be permitted to vote for the adoption of the Agreement and thereafter to receive the agreed value for their stock in cash, and that such transaction would circumvent the statutes of the State of Delaware providing for the payment of cash to dissenting stockholders. I am of the opinion that there is no substance to this objection so far as the Delaware Law may be concerned. I do not assume to speak upon the Nevada Law.

Under the law of Delaware whenever statutory authority is granted to the accomplishment of a particular corporate purpose stockholders may vote upon the subject as they see fit and their purpose or motive in so doing will not be inquired into by the Courts. This was so held in Allied Chemical & Dye Corporation v. Steel and Tube Company, 14 Del. Ch. 1, and in Heil v. Standard Gas & Electric Company, 17 Del. Ch. 214. In these cases the Court stated that the stockholder may exercise his voting right upon whim or caprice or even for personal profit so long as no advantage is obtained at the expense of fellow stockholders. This means that the stockholder may vote as he sees fit, but in the transaction, whatever it may be, whether a sale of assets, merger or otherwise, a stockholder or group of stockholders cannot take to themselves an advantage in respect of the assets of the corporation which is denied to other stockholders.

In MacCrone v. American Capital Corporation, 51 Fed. Supp. 462, the Federal District Court in Delaware stated:

> "Moreover, the merger is an act of independent legal significance, and the mere fact that those who initiate it will [252] receive some benefit does not make it fraudulent."

I find in the proxy statement, on page 5 thereof, a statement that Sunray intends to invite tenders of shares of Capital Stock of Pacific Western, other than the Getty shares, at a price of $68.00 per share. This, as I understand it, means that all stockholders

of Pacific Western will be accorded the same right to sell their shares at the price fixed as will be accorded the Getty interests. No inequality of treatment therefore will result so far as stockholders of Pacific Western are concerned.

It is likewise objected that the Getty interests and presumably any other stockholder who would accept the offer of Sunray just above referred to would thereby circumvent the statutes of Delaware pertaining to the appraisal of the value of shares of dissenting stockholders under the provisions of Section 61 of the Delaware Corporation Law. Obviously no such result will follow because such shares could not possibly fall within the provisions of Section 61. As above shown, under the provisions of Article IV (b) these shares of Pacific Western which will be owned by Sunray prior to the Agreement of Merger becoming effective will be cancelled and no shares of Sunray will be issued in respect thereof. They obviously could not fall within the appraisal provisions of Section 61 because they will be shares owned by the resultant corporation itself. As I have previously stated, the purchase of Pacific Western shares is a condition precedent to the accomplishment of the merger and is in my opinion under the Delaware law unobjectionable. The acquisition of [253] these shares does not in any sense constitute a circumvention of the provisions of Section 61 of our law. The transaction relating to the purchase of Pacific Western stock may be collateral to but it is independent of the Agreement of Merger. The fact that the mer-

ger may be conditioned upon the acquisition of such shares furnishes no objection under the Delaware Corporation Law.

I do not assume to speak upon the fairness of the terms and conditions of the Merger Agreement. The authorities above referred to will disclose that under the Delaware Law, as I believe is true generally, the transactions of the Directors or stockholders acting under Charter of statutory authority are accorded a presumption of fairness and the Delaware Courts do not assume to substitute their own judgment for the judgment of the Directors or stockholders where the matter may be referred to an honest difference of opinion or judgment.

> Porges v. Vadsco Sales Corporation, 32 Atl. (2d) 148.

The Court in the MacCrone case, above referred to, quoted with approval from the Porges case as follows:

> "Where fraud of this nature is charged, the unfairness must be of such character and must be so clearly demonstrated as to impel the conclusion that it emanates from acts of bad faith or a reckless indifference to the rights of others interested, rather than from an honest error of judgment."

Upon consideration of the objections to the proposed merger which I have dealt with I am of the opinion that none of the objections is valid and

if the said objections [254] should be presented to the Courts in Delaware none of them would be sustained.

CALEB S. LAYTON.

Sworn to and subscribed before me, the day and year first aforesaid.

[Seal] GERTRUDE T. PARKINSON,
Notary Public.

Service by copy admitted November 20, 1947.
/s/ WM. WOODBURN,
One of Attorneys for Plaintiff.

[Endorsed]: Filed Nov. 20, 1947.

[Title of District Court and Cause.]

AFFIDAVIT OF CHARLES H. SCHIMPFF

State of California,
County of Los Angeles—ss.

Charles H. Schimpff, being first duly sworn, deposes and says:

That he is a Vice President of Capital Research Company, a corporation. That Capital Research Company was requested by David T. Staples, President of Mission Corporation, a Nevada Corporation, to analyze the proposed merger of Sunray Oil Corporation, a Delaware corporation, Pacific Western Oil Corporation, a Delaware corporation, and said Mission Corporation from the point of view of the fairness to Mission stockholders of said

proposed merger. That affiant has no interest in any of said Companies or in the said merger, with the exception that affiant, individually, is one of two trustees in a testamentary trust in which said trust there has been since 1933 and now is held fifty shares of stock of Pacific Western Oil Corporation.

That affiant is of the age of fifty years, and has been a resident of the State of California since 1928. That affiant [256] has been engaged in the security and finance business since 1929. Affiant has served as Vice President and Director of Pacific Company of California, which company is an underwriter and distributor of securities; as Vice President, Director and member of investment Committee of Los Angeles Industries, a company having diversified investment portfolio; and as Vice President of Transamerica Corporation. That affiant's duties with this latter company consisted in part of analyzing the worth and business operations of industrial companies for the purpose of preparing a report thereon looking toward the possible purchase by said Transamerica Corporation of said companies. That Capital Research Company, of which affiant is now a Vice President, provides the statistical analysis and investment recommendations for two investment trusts whose portfolios total in excess of $20,000,000.00.

That affiant has been during his business career a Director of Central National Bank of Peoria, Illinois; Pacific Company of California; Merchants

Finance Corporation; Los Angeles Industries; The Axton-Fisher Tobacco Company; Adel Precision Products Corp.; Aerco Corporation; Enterprise Engine and Foundry Company; Communications Equipment Corporation; Columbia River Packers Association.

In making his present analysis, affiant used the following source material: Notice of meeting and Proxy Statement of Mission Corporation for Special Meeting of Stockholders December 6, 1947; Annual Reports of the merging companies; The Wall Street Journal (New York and Pacific Coast Editions); Moody's Investors Service; Standard & Poor's Corporation Publications, and Commercial & Financial Chronicle.

That affiant's analysis of and conclusions with respect to said proposed merger, from the standpoint of its fairness to the stockholders of Mission Corporation, is as follows:

Affiant has been informed that Sunray Oil Corporation (hereinafter for convenience called Sunray), is offering the holders of the shares of capital stock of $10 par value of Mission [257] Corporation (hereinafter called Mission) six shares of the Common stock of the par value of $1 each of Sunray for each share of Mission, and that holders of Mission shares who do not accept this exchange offer and who avail themselves of the alternative provided by the General Corporation Law of the State of Nevada will receive the fair cash value of their shares determined in accordance with the provisions of said law.

Affiant is further informed that the contention has been put forward that the foregoing offer of exchange is unfair to the minority shareholders of Mission. In the opinion of affiant the offer can be unfair only under the following condition: (1) the realizable value of Mission shares to the minority stockholder is in excess of the market value of the Sunray shares offered in exchange, or (2) the true market value of Sunray shares is below their present market value, or (3) both the foregoing conditions exist. It thus appears that the entire question of unfairness can be narrowed down to a determination of the realizable value of Mission shares to the minority stockholder and the true market value of Sunray shares as compared to their present market value.

Before attempting this determination, affiant examined the ways in which the holder of common shares of a corporation can realize upon them. It is customary in analyzing securities to determine the net asset value per share, and this figure appears in practically all statistical services. It is usually arrived at by subtracting from the total tangible assets of a corporation all of its current liabilities, other liabilities, reserves, debts, and the par value of all classes of stock entitled to preference over the common shares in liquidation. The remaining figure is then divided by the number of common shares outstanding. Except where the articles of incorporation of a company specifically provide for the re-purchase by the corporation of its common shares at a figure

bearing a direct relationship to the net asset value per share, as in the case of [258] many open-end investment trusts, or in the event of liquidation, no method is normally open to the holder of common shares of a corporation whereby he can exchange his shares either for his proportionate share of the net assets of the corporation or for the cash equivalent thereof. This fact is paramount in any determination of the value of common shares to their holder.

Since, as affiant is advised, the stockholders of Mission have no right to require Mission to re-purchase their shares, and since liquidation and the ensuing distribution of the net assets to the stockholders is not contemplated, it is necessary to examine the other courses which are normally open to the stockholder for realizing upon his common shares. In the opinion of affiant, the only other course is the sale by the stockholder of his shares, (1) for cash, or (2) for other property.

If a security is listed and actively traded upon a recognized stock exchange, the sales of that security upon the exchange are generally accepted as being the value of the security to a minority stockholder at the time of each sale. That there is no direct relationship between the market value of a security and its net asset value per share can readily be determined from the tabulation (which is attached hereto, marked Exhibit A, and which is hereby referred to and made a part hereof), which shows for various dates the net asset value per share and the sale price

of the common shares of various companies, both in the oil industry and in other types of business. From said Exhibit A it may be noted that the ratio between market value and net asset value per share is not a constant for each security but varies from time to time and from industry to industry. Attention is particularly directed to the figures for Petroleum Corporation of America since this company is most nearly comparable to Mission in that it owns shares of other companies in the oil industry and has little else in the way of assets other than cash. [259]

As stated earlier herein, regardless of the amount of net assets per share which a corporation has either on its balance sheet or as so-called hidden assets, the stockholder normally has no way of realizing upon them. An examination of Exhibit A will demonstrate also, that the existence of net assets per share either stated on the balance sheet or as so-called hidden assets does not assure the minority stockholder a market value for his shares which bears any fixed relationship to the per share value of these assets. On the contrary, the market place makes its own determination of the value of both the disclosed and so-called hidden assets of each corporation, and this evaluation changes from time to time, from company to company, and from industry to industry.

The shares of both Mission and Sunray are traded upon the New York Stock Exchange. It is reasonable to assume, therefore, that the sales of these stocks upon the New York Stock Exchange accur-

ately record the amount which any minority shareholder of either corporation could hope to receive from the sale of his shares.

In the opinion of affiant, any contention that so-called hidden assets entitle the minority shareholder to a price higher than that fixed in the market place is clearly illogical since as noted there is no way for the minority stockholder to realize upon his shares except through the market place, and the market place makes its own determination of the value of a corporation's assets both recorded and hidden.

Although it may be argued that the shares of Mission will have a future market value in excess of their present market value due to influences which will affect the price of this stock more favorably than the price of Sunray stock, in the opinion of affiant, such a contention is unworthy of consideration since it is dependent upon assumptions for which no factual support can be mustered. The market place is quite capable of considering all factors which might contribute to the future enhancement of the value of a stock, [260] and this possible future value discounted to the present time is one of the factors considered by the market place in arriving at its present day value for any security.

Since the market place is the only effective determinant of value, affiant has examined the value which said market has set for the shares of Mission and Sunray. Such investigation included a date

prior to the circulation of the first rumors of the proposed Sunray et al. merger, and December 31, 1946, provided a convenient such date for the reasons: (1) it was not until several months later that the first rumors regarding the Sunray et al. merger began; and (2) the companies in question all prepared both balance sheets and profit and loss statements, actual and/or pro forma as of that date.

For Mission, based upon its balance sheet and profit and loss statement as of December 31, 1946, the figures are as follows:

Net asset value for Common stock	$19,266,989.00
Net asset value per share (1,374,145 shs)	$ 14.05
Earnings after taxes 12 months to 12/31/46	$ 2,381,717
Earnings after taxes 12 months to 12/31/46 per share	$ 1.735

The last sale of Mission stock on December 31, 1946, was $42.00 per share. This is 24.2 times the earnings per share and 299% of the net asset value per share both as shown above. Both ratios appear unduly high when compared to other oil companies as shown in the tabulation which is attached hereto, marked Exhibit B, and which is hereby referred to and made a part hereof.

The balance sheet of Mission, however, does not reflect the market value as of December 31, 1946, of the shares of Tidewater Associated Oil Company and Skelly Oil Company owned by Mission, since said holdings are carried at cost. As of the close of business December 31, 1946, the last sale of Tide-

water Associated stock was $19.87½ a share and of Skelly $71.00 per share. If these [261] values for Mission's holdings of the stocks of these two companies are substituted for the balance sheet figures, the following figures are applicable:

Net asset value for Common stock	$68,188,699
Net asset value for Common stock per share	$ 49.49

Mission's share of the net earnings of Skelly Oil Company amounted to $6,002,000, of which Mission received $1,165,314 in dividends. If 94% of the remainder is added to Mission's net after taxes, the following figures are applicable:

Earnings after taxes 12 months to 12/31/46	$ 6,928,201
Earnings after taxes 12 months to 12/31/46 per share	$ 5.02

The market price of $42.00 per share is 8.37 times the adjusted earnings as shown above and 85% of the adjusted net asset value per share shown above. It thus appears that the market place has taken into account the so-called hidden assets in Mission and placed a value upon them which brings the ratios of market value to earnings per share and net asset value into line with these ratios for other companies as shown by Exhibit B. The discount from net asset value per share of 15% compares with a discount of 23.9% for Petroleum Corporation of America as of the same date.

For Sunray, based upon its balance sheet and

profit and loss statement as of December 31, 1946, the figures are as follows:

Net asset value for Common stock	$30,258,494.00
Net asset value for Common per share (4,689,186 shs)	6.47
Earnings after taxes 12 months to 12/31/46 after Pfd. div. for 1 year on stock outstanding at end of year	3,128,217.00
Earnings after taxes 12 months to 12/31/46 after Pfd. div. for 1 year on stock outstanding at end of year, per share	0.668

The last sale for Sunray stock on December 31, 1946, was at $8.00 per share. This is 11.9 times the earnings per share shown above and 123.5% of the net asset value per share shown above.

It thus appears that the market appraised the stock of Sunray on a higher basis than the stock of Mission, both from the standpoint of earnings and of net asset value per share. That it is not unusual for an operating company to sell at a higher ratio of market price to net asset value can be determined by reference to Exhibit B which shows this ratio for the same date for various operating oil companies as compared to an oil stock holding company, namely Petroleum Corporation of America.

Affiant has been furnished a copy of the notice of meeting of December 6, 1947, and proxy statement sent to the holders of stock, and said proxy statement contains, as Exhibit G pro forma financial statements of Sunray as of December 31, 1946.

Based upon said Exhibit G the figures for Sunray are as follows:

Net asset value for Common stock	$79,945,586.00
Net asset value for Common stock per share (9,083,208 shs)	8.79
Earnings per share (pro forma income statement)	0.35

However, to put the Sunray pro forma balance sheet and income statement as of December 31, 1946, on the same basis as that of the statement of Mission as of the same date adjusted to reflect the market price of Tidewater Associated and Skelly stocks, two adjustments should be made: (1) Sunray's holdings of Skelly should be stated at $71.00 per share (the same price as used in the Mission adjustment); and (2) 94% of Sunray's share of the net income of Skelly after deducting dividends paid should be added to earnings after taxes. When these two ajustments have been made and allowance has been made for preferred dividends on Sunray Preferred, the figures are as follows: [263]

Net asset value for Common stock	$57,167,334.00
Net asset value for Common stock per share	6.30
Earnings per share	0.86

Using these adjusted figures, the market value for Sunray of $8.00 per share as of December 31, 1946, is 9.3 times earnings and 126.9% of net asset value.

Since on December 31, 1946, the market place had no knowledge of the presently contemplated Sunray, et al., merger (plans for which were not then in existence, so far as affiant is advised) in

order to arrive at a price which the market would, in affiant's opinion, have placed upon the shares of Sunray had the merger been in effect on December 31, 1946, the hereinabove computed ratio (123.5%) between the market price for Sunray Common and the actual net asset value per share and the hereinabove computed ratio (11.9 times) between the said market price and the actual net earnings per share as of that date, should properly be applied to the pro forma net asset value and net earnings per share both before and after the hereinabove described adjustment of the balance sheet and income statement. The application of said ratios as of December 31, 1946, results in the following computations:

		Per Share
Before Adjustment		
$8.79 Net asset value per share x 123.5%	=	$10.82
$0.35 Net earnings per share x 11.9	=	4.16
After Adjustment		
$6.30 Net asset value per share x 123.5%	=	7.77
$0.86 Net earnings per share x 11.9	=	10.48

Based upon the adjusted figures, in affiant's opinion, a price midway between $7.77 and $10.48, or $9.125 a share would approximate the value which the market would have placed on the shares of Sunray Common had the merger been in effect on December 31, 1946. It thus appears that an offer of six of such shares having [264] an aggregate market value of $54.75 in exchange for one share of Mission having a market value of $42.00 would have been eminently fair to the Mission minority holder. It would, in fact, have provided the minority holder

of Mission stock a price in excess of the $49.49 per share net asset value for the Common stock of Mission as hereinbefore set forth on page 7, line 5 hereof. Moreover, such offer would have afforded the first opportunity since 1938 for a Mission minority stockholder to dispose of his stock at a premium over its net asset value, inasmuch as the market price of Mission has been uniformly below the net asset per share since that time. Also as a simple arithmetical computation will show, a market price for Sunray as low as $9.50 per share would make the Sunray offer to a Mission stockholder of greater value than any amount which the Mission stockholder has heretofore been able to realize even after the sharp run up in Mission stock which occurred after the announcement of the Sunray offer.

Affiant has been advised that the point has been raised that Mission now has no funded debt or Preferred stock whereas Sunray after the merger will have about $50,000,000 of debt and about $50,000,000 of Preferred stock ahead of the Common. In the opinion of affiant, whether this strengthens or weakens the Common stock of Sunray Oil Corporation depends almost entirely on the investor's opinion of the outlook for the oil industry. Thus, if this outlook is held to be favorable, the existence of debt and preferred stock carrying low interest and dividend rates would be favorable to the common stockholder since such capital structure would permit a larger share of the prospective increase in earnings to be made available for the common stock

than if the entire capitalization of the company consisted of common stock. In the opinion of affiant the outlook for the oil industry is definitely [265] favorable.

To the affiant it would thus appear that regardless of any argument that the offer of six shares of Sunray for one share of Mission is unfair to the minority stockholders of Mission, the evidence of the market place demonstrates conclusively to the affiant that the offer is a fair one. The alleged existence of so-called hidden assets or of future benefits does not, in the opinion of affiant, justify any assumption that the minority stockholder can benefit at the present time in any way therefrom, since the minority stockholder has no alternative (unless his statutory remedy under the Nevada Corporation Law be considered an alternative) but to accept the verdict of the market place; and in the instant case that verdict is, in the opinion of affiant, conclusive proof of the fairness of the offer.

/s/ CHARLES H. SCHIMPFF.

Sworn to and subscribed before me this 19th day of November, 1947.

[Seal] ELLEN WERTZ,

Notary Public in and for the County of Los Angeles, State of California.

My Commission Expires September 29, 1950.

Service by copy admitted November 20, 1947.

/s/ WM. WOODBURN,
One of Attorneys for
Plaintiff. [266]

EXHIBIT A

	December 31, 1932			December 31, 1936			December 31, 1940			December 31, 1943			December 31, 1946		
	Net Asset Value Per Share	Market Price Per Share	Market Price As Percent of Net Asset Value	Net Asset Value Per Share	Market Price Per Share	Market Price As Percent of Net Asset Value	Net Asset Value Per Share	Market Price Per Share	Market Price As Percent of Net Asset Value	Net Asset Value Per Share	Market Price Per Share	Market Price As Percent of Net Asset Value	Net Asset Value Per Share	Market Price Per Share	Market Price As Percent of Net Asset Value
Petroleum Corp. of Americea (a)	$ 7.23	$ 4–3/4	65.8	$ 23.95	$17–7/8	74.7	$ 8.05	$ 6–1/4	77.6	$ 9.40	$ 8–7/8	94.5	$ 12.20	$ 9–1/2	77.8
Ohio Oil Company	17.33	6–7/8	39.7	11.85	17¾	151.0	12.03	7–3/8	61.2	14.49	18–1/4	126.2	18.57	24–3/8	128.0
Standard Oil of California	42.50	24–1/2	57.1	41.56	44–1/4	106.0	44.41	18–1/2	40.8	45.98	37–1/4	81.2	52.74	57–3/8	109.0
Union Oil Company	36.60	9–1/2b	26.0	28.62	25–3/4	89.7	29.78	12–1/2	42.0	31.37	19–1/8	61.2	33.21	22	66.3
Skelly Oil Company	20.90	3–1/2	16.7	26.57	47–1/4	177.5	43.67	21	48.0	56.78	38–1/8	67.1	77.39	71–1/4	91.8
New York Central R. R.	147.80	18	12.2	138.70	41–1/4	29.8	115.50	13–7/8	12.0	128.79	15–5/8	12.1	130.23	18–1/8	13.6
U. S. Steel Corporation	187.06	27–1/2	14.7	143.34	78	58.4	124.31	69–3/4	56.1	143.61	51	35.6	142.08	72	51.0
Phelps Dodge Corporation	35.19	5–1/8	14.5	32.15	54–1/2	170.0	32.37	35–3/8	109.0	33.32	20–7/8	62.7	34.17	42–1/2	123.8
American Woolen Company	11.69	4–1/2	38.4	10.47	9–3/4	93.1	.....	8–3/8	.....	28.19	6–1/8	21.7	65.77	33–7/8	50.8

(a) The net asset value shown for this company reflects the market price as of the date indicated of the various securities owned by this company.

EXHIBIT B

As of December 31, 1946

	Market Price Per Share	Net Asset Value Per Share	Market Price As Percent of Net Asset Value	1946 Earned Per Share	Mkt. Price Times Earnings Per Share
Ohio Oil Company	$23–7/8	$18.49	129.2	$ 2.78	8.6
Skelly Oil Company	71	75.38	94.2	10.30	6.9
Standard Oil Company of California	57–3/4	49.66	116.1	5.15	11.2
Pure Oil Company	24–1/8	30.59	79.1	3.74	6.5
Phillips Petroleum Company	58	50.44	115.1	4.60	12.6
Petroleum Corporation of America	9–1/2	12.20	76.1	.45	21.1

[Endorsed]: Filed Nov. 20, 1947.

[Title of District Court and Cause.]

AFFIDAVIT OF DAVID T. STAPLES

State of Nevada,
County of Washoe—ss.

David T. Staples, being first duly sworn, deposes and says:

I am a citizen and resident of the County of Los Angeles, State of California, and am fifty (50) years of age. I am President of Pacific Western Oil Corporation, hereafter referred to as "Pacific," and have been since February 26, 1947. Prior thereto I was Executive Vice-President from the fall of 1941. I have been associated with the company as its attorney and in other capacities since the year 1929.

I was first elected to the Board of Directors of Mission Corporation, hereafter referred to as "Mission," and as President of Mission on October 18, 1947. My connection with and knowledge of Mission dates from 1935, when Pacific first started buying Mission stock. Since then the holdings of Mission in Tide Water Associated Oil Company, hereafter referred to as "Tide Water," have been increased about 467,000 shares after the exercise of the Nevada [269] Incorporation option for 250,000 shares and its holdings in Skelly Oil Company, hereafter referred to as "Skelly" have been increased about 25,000 shares. Aside from the ownership by Mission of the stock of Skelly and Tide Water, Mission has one fully developed oil lease

which is being operated by Skelly for Mission. The value of Mission stock depends largely upon the market value of its principal assets, which are its stock holdings of Tide Water and Skelly. For the last several years I have heard many suggestions as to a merger of Pacific and Skelly, Pacific and Mission, Mission and Skelly, and/or Pacific and Tide Water.

Mr. Fero Williams has been a director of Mission since 1942, a director of Skelly since 1937, and Assistant Treasurer and Controller and financial adviser of Pacific for many years. Since 1937 he has made various evaluations of the assets of these companies and has many times discussed them with me. In February or March of this year I was told that there had been discussions between Tide Water and Mr. J. Paul Getty and Mr. Thomas A. J. Dockweiler looking to the purchase of the Pacific stock then held by Mr. Dockweiler as trustee of the Sarah C. Getty Trust and by Mr. J. Paul Getty for a price of $68.00 per share. I believed that if such a deal was put through it would probably result in a merger of Pacific, Mission, Skelly and Tide Water. At my suggestion Mr. Williams renewed studying and making analyses and evaluations of the assets of the various companies.

I afterward learned that the purchase of the stock of the so-called Getty interests by Tide Water had been abandoned, but about that time I was advised that Sunray Oil Corporation, hereafter referred to as "Sunray," was interested in acquiring stock of the Getty interests. I first heard that they had

offered $58.00 a share, and then was told by Mr. Dockweiler that the trustees had declined the offer. During September I knew that there were active negotiations for the purchase of such stock at $68.00 per share. [270] I also knew that the agreement of sale, which is attached as Exhibit A to plaintiff's complaint, was executed on October 4, 1947. My recollection is that the agreement was shown to me at that time by Mr. Joseph Peeler, tax attorney. Since August, and prior thereto, Mr. Williams had been working on an analysis and evaluation of the assets of Mission, Skelly, Pacific and Sunray, as we knew that the purchase of the stock would involve a merger of some of those companies. I also assumed until shortly before the meeting of the Mission directors in Tulsa, Oklahoma, on October 18, 1947, that it would be a merger of all four companies.

On many different occasions during September and the first part of October Mr. Williams and I discussed the analysis which he was making. I would not be able to give the exact dates of any of these conferences because they were almost continuous. Mr. Emil Kluth, who is in charge of the Geological Department of Pacific, and who has been for some time a director and Vice-President of Mission, and a director of Skelly, was present at many of those discussions. I cannot state exactly when I first heard the proposed ratio of exchange, but I believe it was in the month of July. On Monday, October 6th, Mr. Dockweiler, Mr. David Hecht, who

is one of the attorneys for Pacific and also a personal attorney of Mr. J. Paul Getty, and Mr. Petigrue of Breed, Abbott and Morgan, attorneys for Sunray, were in my office. It was stated to me that Sunray was going to make an offer of five or six shares of the surviving corporation for every one share of Mission and nine to ten shares of the surviving corporation for each share of Skelly.

Monday afternoon, October 13th, I had a call from Mr. Dockweiler from Tulsa, Oklahoma. He told me in substance it had become apparent that Mr. Skelly was not going to cooperate in passing upon the proposed merger. The following Wednesday, [271] October 15th, I was asked to take a plane for Tulsa. I did so, reaching there at about 1:00 a.m. Friday morning, the 17th. I was in conference at various times during that day and evening with Mr. Boal, Mr. Williams, Mr. Dockweiler and Mr. Kluth. During a part of that day Mr. Dockweiler, Mr. Kluth and Mr. Williams were in attendance at a directors' meeting of Skelly. Mr. Williams went over with us very carefully his analysis and evaluations of the assets of the respective companies, Mission, Pacific and Sunray, which were involved in the proposed merger. I have read the affidavit and report of Mr. Williams, served and filed herewith. It contains substantially the views which he expressed to us as to values of said companies and the basis of his analysis of their values, and additional factors. I personally was entirely satisfied then, and am now, that the exchange basis of six shares of the surviving corporation for one of Mis-

sion was and is a fair and equitable offer to Mission stockholders.

The directors' meeting of Mission I understand convened at 9:30 o'clock a.m., October 18, 1947, and continued to 10:55 a.m. I did not attend at the opening of the meeting but was called in as soon as I was elected a director. I had been advised that it was intended to elect me in place of Mr. Graves, who had tendered his resignation as a director of Mission. The merger plan was not discussed at the morning meeting, which recessed at 10:55 a.m., resumed at 3:00 p.m., and lasted until 7:45 p.m. Nearly all of the afternoon session was devoted to discussion of the merger plan. I do not recollect that Mr. Skelly at any time ever stated that the ratio of exchange was unfavorable, but stated the matter was being rushed and he wanted more time to consider it. Mr. Hyden stated emphatically that he was not saying the ratio was not fair, but that they had not had sufficient time to consider it and that there had not been enough outside independent appraisals to enable the directors to reach an independent [272] judgment. I do not say that those were the precise words, but that was the substance of Hyden's statement.

If the transaction was to be consummated this year it was impossible to accede to any request for delay. As far as I was personally concerned, I had reached the conclusion that the transaction was an entirely fair one. I realized, of course, that I was a director of Pacific. At the same time I was conscious of the fact that, in becoming a director of

Mission, it would be improper for me to agree to any merger which I did not think was fair. In voting for the merger I do not and did not feel that there was any conflict between my duties as a director of Pacific and those as a director of Mission. The amount to be received by the stockholders of Pacific in the merger was fixed by arms length negotiations between Sunray and the majority stockholders of Pacific. The price arrived at was supported not only by the value of Pacific's assets but was the same price which such stockholders had been offered by Tidewater several months previously. Subsequent to the Tidewater offer there have been raises in the price of oil which made oil properties and oil securities more valuable. The Pacific stockholders were to have no continuing equity interest in the merged company. I state emphatically that I could not have gone upon the Mission board and voted as I did if I had not in my own judgment reached the conclusion that the deal was fair to all Mission stockholders. I had and have no personal interest whatsoever in voting in favor of the merger. In fact my own personal interests are probably directly contrary to the approval of the merger. I am President and a Director of both Pacific and Mission. I expect to continue as an employee of the merged company. I have not been [273] promised to be made a director or an officer of the merged company. Sunray has advised that the Board of Directors of Sunray are to continue to be the Board of Directors of the merged company and I am not one of such directors. This

situation is equally true of the directors Williams and Kluth. Furthermore the approval of the proposed merger by the Board of Directors merely constitutes an initial step preparatory to the submitting of the merger to the stockholders for their approval. It is my understanding that the stockholders and not the directors must ultimately determine whether or not the merger is to become effective.

I felt that I and the other directors voting for the merger had ample and sufficient information for our decision. As regards the statement that directors Skelly and Hyden needed any independent advice, I did not concede that for a moment. I know that Mr. Skelly as the founder and President of Skelly has been actively engaged in its management since it was founded. He had been President of Pacific from 1937 until his resignation on February 26, 1947. I believe that both Mr. Skelly and Mr. Hyden were thoroughly familiar with the operations and values of Mission, Skelly and Pacific, and that they were also, from a business and operating point of view, sufficiently familiar with the values of Sunray to enable them to form an opinion as to the fairness of the ratio. The fact that neither Mr. Skelly nor Mr. Hyden at that time asserted or pointed out any reason why the proposed ratio of exchange was unfair confirmed this view. I thought, and still think, that the plea for further time was simply a method to kill the deal, as under the agreement of October 4, 1947, between Sunray and Mr. Thomas A. J. Dockweiler, Mr. George Franklin

Getty II and Mr. J. Paul Getty, the merger had to be consummated during 1947 [274] or it was to be cancelled.

The amended complaint alleges that Pacific owns 47% of the stock and is in possession of sufficient additional proxies to approve the merger. Pacific owns slightly less than 47% of the stock and has no proxies from any other stockholders of Mission. Pacific has not solicited proxies and does not intend to do so. Without the affirmative action of additional Mission stockholders voting in favor of the merger it is my understanding that it cannot become effective.

In order to solicit proxies the Mission management was required under the Securities and Exchange Act and the rules and regulations of the Security and Exchange Commission to prepare a voluminous proxy statement setting forth in detail full and complete information concerning all the constituent corporations to the merger, their businesses and properties, the terms of the merger, the terms of the purchase agreement between the Getty interests and Sunray, the detail of the Tidewater sale, detailed financial statements of the several corporations and other pertinent data. A draft of the proxy statement was filed with the Securities and Exchange Commission and reviewed by that agency prior to being sent to the stockholders. That agency not only reviewed the draft of the proxy statement and required additional information to be included in it but as I am informed reviewed the reports of the petroleum engineers to substantiate

their conclusions as to the oil and gas reserves of Sunray and the other corporations. A copy of such proxy statement is annexed hereto and made a part thereof. The contents are true to the best of my knowledge, information and belief.

The proposed merger, in my opinion, is meritorious for business reasons. Sunray is a producer of crude oil, gasoline and refined products and Skelly in addition is a retail [275] marketer of gasoline and refined products. The combined production of crude oil should insure to both Skelly and Sunray a sufficient quantity of such crude oil for the continuous operations of their respective refineries and the expansion of their business. Pacific's production of crude oil in California should enable the merged company to expand the refining activities heretofore carried on by Sunray in California. Skelly is critically in need of additional sources of gasoline and refined products to meet its marketing requirements. Sunray as a producer of gasoline and refined products, with no retail marketing facilities, will be able to furnish Skelly with this needed gasoline. Skelly's production of crude oil in its Velma field can be used to good advantage by Sunray at its new refinery at Duncan, Oklahoma. The use of this oil at such refinery will also insure to Skelly an outlet for its Velma production. The Sunray refinery at Duncan will be a producer of high octane gasoline. The Skelly refinery at Eldorado is not capable of producing high octane gasoline. If the trend to increase the octane rating of gasoline continues, Skelly's competitive position as a distributor of gasoline will be improved by hav-

ing available the high octane gasoline from Sunray's Duncan refinery. The joint transportation facilities, bulk stations, etc., owned by both Sunray and Skelly in the Mid-Continent, will be available to both companies for their mutual benefit. The combination of the resources of Sunray and Pacific will facilitate greater exploration work in the search for crude oil and permit an expansion of development of their combined crude oil resources. As a result of this joint operation of Sunray and Pacific the Mission stockholders will benefit.

In Witness Whereof, I have hereunto set my signature [276] this .... day of November, 1947.

/s/ DAVID T. STAPLES.

Subscribed and sworn to before me this 20th day of November, 1947.

[Seal] RUTH T. QUIVEY,

Notary Public in and for the County and State Aforesaid.

My Commission Expires March 15, 1948.

Service by copy admitted November 20, 1947.

/s/ WM. WOODBURN,
One of Attorneys for
Plaintiff. [277]

[A printed copy of Mission Corporation Notice of Meeting and Proxy Statement was annexed to and made a part of the Staples affidavit. It is omitted from the record at this point as it is again included as Plaintiff's Exhibit No. 1 in evidence.]

[Endorsed]: Filed Nov. 20, 1947.

[Title of District Court and Cause.]

AFFIDAVIT OF HAROLD J. WASSON

State of Nevada,
County of Washoe—ss.

Harold J. Wasson, being first duly sworn, deposes and says:

I am a consulting Engineer with offices located at 25 Broadway, New York City. For the past 25 years I have been engaged as a specialist in the field of petroleum property valuation and during that period I have examined and evaluated the assets and oil properties and oil reserves of a great many oil companies throughout the United States for the purpose of furnishing opinions to oil companies, finance institutions and governmental agencies with respect to the fair and reasonable value of such properties. For 5 of this 25-year period I was associated in New York with E. B. Hopkins, a Consulting Petroleum Geologist and for the last 20 years I have carried on my own business. I obtained my preliminary education at the University of Minnesota and received a degree in mining engineering in 1914. For about 6 years thereafter I was employed by oil companies in this country and in South America in field work as an oil geologist and aside from a period of two years in the United States Army during World War I, I have devoted substantially all my professional activities to matters concerning the value of petroleum properties.

Since starting my own firm 20 years ago I have personally visited or examined most of the oil fields

of the United States. Some of these have been complete investigations based upon company records and visits to the various fields and headquarters and some have been based upon public documents and reported facts relating to production and costs of operation.

During my years of this work I have made investigations of both Sunray Oil Corporation properties and properties of Pacific Western Oil Corporation. Some of these investigations were for Sunray and some for other parties interested in Pacific Western Oil Company. Accordingly before undertaking the present investigation I was familiar with the extent and nature of the properties of each.

On or about the latter part of September, 1947, I was engaged by the Sunray Corporation to make a full investigation and to appraise the oil properties of Pacific Western and Sunray for the purpose of estimating the monetary value of these oil properties. These appraisals were ordered made in connection with a proposed merger of Pacific Western Oil Corporation and Mission Corporation into Sunray Corporation.

In order to give an opinion in these respects, all pertinent company records of Sunray and Pacific Western were examined by me and [361] my associates. This study enabled me to form a judgment on the future producible reserves of oil and gas attributable to each producing property.

Based on this data I calculated the future sales value of this oil and gas referred to the price of

oil and gas prevailing at August 31, 1947, and estimated cost of producing the same. From these figures I established the "net realization" deriveable from each producing property. Realization is the difference between the sale value of the oil and gas to be produced and the cost of producing the same projected over the life expectancy of each field before income taxes.

As the first step in estimating the fair and reasonable value of each producing unit as of the present time, the "net realization" amounts were reduced to present worth by discounting them at 6% compound discount for the period of their deferment from the appraisal date.

With these discounted amounts as a basis, I then estimated the fair and reasonable present monetary value of the properties of each company. From my experience in evaluating and determining fair and reasonable value of oil properties, it is my judgment that under present economic conditions the fair and reasonable value of the oil and gas properties will approximate 70% to 80% of the discounted mathematical amounts referred to above.

The valuation of petroleum properties by attempting to place an arbitrary value per barrel of daily oil production is not a proper method of determining their value, and is not now in use by qualified petroleum appraisers and consultants.

The procedure described above and followed in my report is the evaluation process most generally used by leading professional appraisers of petroleum properties. [362]

I set out below a summary of my investigation and conclusions:

Pacific Western Oil Corporation
(Quantities of Oil and Gas)

Recoverable oil	42,060,600 bbls.
Recoverable gas	6,000,000 MCF

Monetary Valuation
Estimated Dollar Realization

	From Oil	From Natural Gas
1st 10-year period	$41,800,000	$420,000
2nd 10-year period	12,088,000	300,000
	$53,888,000	$720,000

Grand Total oil and gas realization $54,608,000

The present worth of estimated realization from oil and gas at 6% compound discount for the estimated period of its deferment is $36,863,170.

My opinion as to the "fair and reasonable present value" of the above discounted figure of estimated realization is approximately $28,300,000, that is to say, approximately 77% of the $36,863,170.

In addition to the foregoing valuation of the oil and gas properties I have evaluated the other assets of the company closely related to its oil and gas interest at the following figures:

(note a)	Undeveloped Leaseholds and Royalties	$1,964,000
(note b)	Fee lands	$1,036,000
	Total	$3,000,000

Note a. The undeveloped leaseholds and royalties were evaluated at their approximate book cost.

Note b. The fee lands, owing to the fact that for the most part they have negligible value from the oil and gas viewpoint, were evaluated at substantially less than their book value and in line with their value merely as agricultural and miscellaneous real estate property based on recent appraisals made by specialists in these values.

Other values reflected in the balance sheet that were noted in our evaluation report were the Getty Realty Company, owner of the Pierre Hotel in New York City, the net quick assets of the Pacific Western Oil Corporation which amounted to approximately $3,600,000, and its extensive share holdings in Tidewater Oil Corporation and Skelly Oil Corporation. These other values, however, were not within the purview of our evaluation which was limited solely to the assets related to the oil and gas interests of the Pacific Western Oil Corporation.

Sunray Oil Corporation
(Quantities of Oil and Gas)

Recoverable Oil	177,238,182	barrels
Recoverable Gas	592,650,000	Thousands of cubic ft. (M.C.F.)

Estimated Dollar Realization

	From Oil	From Natural Gas
1st 10-year period	$148,296,000	$8,843,000
2nd 10-year period	70,482,000	6,791,000
3rd 10-year period	27,758,000	5,613,000
4th 10-year period	5,769,000	5,400,000
	$252,305,000	$26,647,000

Grand Total Oil and Gas realization $278,952,000.

The present worth of the estimated realization from oil and gas at 6% compound discount for the period of its deferment from the appraisal date, August 31, 1947, is $159,436,000.

My opinion as to the "fair and reasonable value" of the above discounted value of the estimated realization is approximately [364] $115,895,000, that is to say, approximately 73% of the $159,436,000

(the present worth of estimated realization from the oil and gas at 6% compound discount) estimated realization from oil and gas.

Attention is called to the fact that since the foregoing evaluations were determined a country-wide increase in the prices being paid for oil has taken place. In my opinion the effect of this price increase adds several millions of dollars to the values above cited.

In addition to the foregoing evaluation of the oil and gas properties, I have evaluated the other assets of the Company as follows:

Undeveloped leases and royalties	(a)	$ 5,104,000
Miscellaneous assets	(b)	827,000
Net quick assets	(c)	10,215,938
Allen Oklahoma refinery	(d)	2,500,000
		$18,646,938

Note (a). Undeveloped leases and royalties were evaluated at their book values August 31, 1947.

Note (b). Miscellaneous assets were evaluated at their book values at August 31, 1947.

Note (c). Net quick assets were taken from the balance sheet of August 31, 1947.

Note (d). The Allen refinery was valued at approximately two times its book value at August 31, 1947. Based on its earnings record over many years, it is fairly worth $2,500,000.

I am informed that since August 31, 1947, Sunray has acquired from the War Assets Administration a large refinery at Duncan, Oklahoma, and a substantial value attributable to this acquisition must be added to the above to convey an overall picture.

Accompanying this affidavit I submit photostatic copies of [365] my work papers which present the basic data upon which my appraisals of Pacific Western Oil Corporation and Sunray Oil Corporation were based. I also submit my reports covering (1), an evaluation report on Pacific Western Oil Corporation, alone, and (2), a report on the evaluation of Sunray Oil Corporation with Pacific Western Oil Corporation which shows the result of the proposed merger of these two companies.

/s/ HAROLD J. WASSON.

Subscribed and sworn to before me this 20th day of November, 1947.

[Seal] /s/ BRUCE B. THOMPSON,
Notary Public.

Service by copy hereby is admitted this 21st day of November, 1947.

/s/ JOHN P. THATCHER,
Attorney for Plaintiff.

[Endorsed]: Filed Nov. 21, 1947. [366]

[Title of District Court and Cause.]

AFFIDAVIT OF CLARENCE H. WRIGHT

State of Nevada,
County of Washoe—ss.

Clarence H. Wright, being duly sworn, deposes and says:

I am President of Sunray Oil Corporation (hereinafter referred to as "Sunray") the principal executive office of which is located at Tulsa, Oklahoma. Sunray is engaged principally in the business of exploring, acquiring interests in and developing prospective and proven oil and gas lands in the production, purchase, gathering, refining and sale of crude oil and the products thereof and of related petroleum products. It produces crude oil and natural gas in the states of Arkansas, California, Illinois, Kansas, Louisiana, New Mexico, Oklahoma and Texas. It also operates refineries at Allen, Oklahoma and Santa Maria, California. It has recently acquired from the War Assets Administration a refinery known as the Beckett Refinery near Duncan, Oklahoma, which is presently being modernized and rearranged for commencing operations on December 15, 1947.

Under conditions which have existed in the oil business since [367] the commencement of the war, it has been apparent that because of the extreme shortages of crude oil, the difficulty in discovering new oil deposits, the shortages of materials, equipment and facilities, the length of time, the monetary

expenditures and difficulty of obtaining necessary materials to acquire or construct new facilities, the compared with the huge advantages possessed by the larger oil companies, for smaller oil enterprises to continue to exist and flourish it is essential for them to combine their resources, reserves, facilities, and businesses and activities.

Accordingly, during the past four years Sunray has undertaken an expansion program which included merging and combining with various other oil enterprises and acquiring and developing facilities and properties. On October 15, 1943, Superior Oil Corporation was merged into Sunray. On June 12, 1944, Darby Petroleum Corporation was merged into Sunray, as of February 1, 1946, Sunray purchased a refinery and oil production at Santa Maria, California, and on August 2, 1946, Transwestern Oil Company was merged into Sunray.

Mr. Lloyd Gilmore, of Eastman, Dillon and Company, a firm of New York bankers, has taken a prominent part in Sunray's various mergers and other transactions above referred to. He has acted as a financial advisor and has been helpful in making the necessary arrangements in connection therewith. In March of this year, I learned through Mr. Gilmore that the Getty interests might be willing to dispose of their control of the Pacific Western Oil Corporation (hereinafter called Pacific Western or Pacific). I became interested in the possibility of working out a transaction with the Getty interests because it appeared that a combination of the business activities and properties of Pacific

Western in California and of Skelly Oil Company in the mid-continent area with the business of Sunray would afford enormous advantages to all of the corporations [368] involved, and would greatly strengthen the competitive position of the joint enterprise thereby benefiting the stockholders of these companies.

I learned that Mr. Paul Getty and the so-called Getty Trust owned above eighty-five per cent (85%) of the outstanding stock of Pacific Western Oil Corporation which, in addition to valuable producing oil properties, owns approximately forty-seven per cent (47%) of Mission Corporation. Mission Corporation owns approximately fifty-nine per cent (59%) of Skelly Oil Company.

Skelly Oil Company, like Sunray, is engaged principally in the business of exploring, acquiring interests and developing oil and gas lands, and in the production, purchase, transportation, refining and sale of crude oil and other related products. Unlike Sunray, Skelly is also engaged in the retail marketing and distribution of petroleum products and liquified petroleum gas, having a number of stations throughout the mid-continent area.

I was familiar with the activities of Skelly Oil Company in a general way since Sunray does and has done business with Skelly for a number of years to the mutual advantage of both companies. I have also known Mr. Skelly, President of the Company, personally for a good many years, in business and socially, both of us residing in Tulsa, Oklahoma.

I had frequently spoken to Mr. Skelly about Sunray Oil Company and about my thoughts and ideas of developing it and about the oil business generally. Mr. Skelly was familiar with Sunray's activities and its business and properties.

Pacific Western and Mission Corporation together own a minority interest (30%) in Tidewater Associated Oil Company, which is one of the larger integrated oil companies doing business throughout the United States. I learned that neither Pacific Western Oil Corporation nor Mission, nor both companies together exercise or [369] attempt to exercise any control of Tidewater Associated Oil Company, and that neither the Skelly Oil Company nor Pacific Western Oil Company (nor, of course, Mission Corporation) were in any way integrated with or dependent upon the business activities of Tidewater Associated Oil Company. I also learned that the Department of Justice had taken the position that Skelly Oil Company and Tidewater Associated Oil Company were competitors, and that any combination of these companies would be considered as a violation of the anti-trust laws of the United States. Therefore, it was apparent from the outset of my consideration of the matter that if the companies would merge, the Tidewater stock owned by Pacific Western and Mission would add no business advantage to the merged company, and would represent a large investment unconnected with their activities or businesses and should be disposed of at the earliest possible time that a suitable price could be realized for the stock.

I ascertained from the directors of Sunray that they would give favorable consideration to a plan for the acquisition of the controlling stock of the Getty interests in Pacific Western and the merger of the various corporations controlled by the Getty interests with Sunray, and took up the matter with Mr. Skelly some time in April of 1947. I told Mr. Skelly that I would proceed no further with the matter and would drop it immediately unless I had his full approval and cooperation. He said he saw no objection to the idea and told me to go ahead to attempt to implement it.

At the time I first spoke to Mr. Skelly about the matter I understood that there was still under consideration a proposal for Tidewater to acquire all of the stock of the Getty interests in Pacific Western at $68.00 per share. There was some doubt, apparently, as to whether this transaction would be approved by the Department of Justice because of the anti-trust implications. [370]

With the full cooperation and approval of Mr. Skelly I authorized Mr. Gilmore to undertake negotiations with the Getty interests in an effort to see whether he could come to some agreement. There then ensued a series a negotiations which started in April or May of 1947, and which resulted in the contract of October 4, 1947, between Sunray and the Getty interests, a copy of which is annexed to the Complaint. From the very commencement of the negotiations I was in touch with Mr. Skelly, keeping him advised from time to time as to its progress. Mr. Skelly and I had numerous discussions

in Tulsa, Oklahoma, and elsewhere. Mr. Skelly also had three conferences with Mr. Gilmore, two in Tulsa and one in New York. At the meetings there was discussed the manner in which the businesses of the various companies could be put together, and the mutual advantages which would ensue therefrom. It was not until some time in July, after the negotiations had made material progress, and Sunray had incurred substantial obligation and expense that Mr. Skelly first expressed a possible objection to a combination of the companies. Prior to that time he always indicated his approval. By that time, however, as I advised Mr. Skelly, the negotiations had progressed too far to drop the matter, and they were continued despite the fact that it then became doubtful as to whether or not we would have the advantage of Mr. Skelly's cooperation.

As a result of negotiations with the Getty interests, it was finally determined that $68.00 per share was a fair and equitable price for their stock in Pacific Western Oil Corporation subject to the preparation of a satisfactory contract. Sunray was chiefly interested in a merger of the various companies and a combination of their properties and activities, and naturally insisted, as one of the conditions for the purchase, that a merger of the various corporations be consummated. The purchase by Sunray of the stock [371] of Pacific Western owned by the Getty interests was and is, as far as Sunray is concerned, merely incidental to the principal business purposes of the transaction, that is, a merger of the corporations. Such purchase was,

however, a necessary condition to the merger (1) because the Getty interests were only interested in a sale of their stock provided the other stockholders of Pacific Western be afforded the same opportunity to sell their stock at the same price; and (2) for the protection of Sunray's stockholders the managers of Sunray could not be interested in the transaction if the Getty interests or any other group were to remain as controlling or dominant stockholders. The Sunray stock at present is very widely held, no stockholder having more than two per cent (2%) of its stock. It was, therefore, just as important to Sunray in making this transaction as it appears to be to the Getty interests that their stock be purchased for cash, and that they sever their connections with the new corporation.

In drawing up the actual written contract with the Getty interests, both the Getty interests and Sunray insisted that a closing agreement be obtained from the Treasury Department because of the large amount involved and the serious tax consequences which might ensue if the transaction were held to be taxable in a manner not contemplated by the parties. As I understand it, a tax closing agreement with the Treasury Department does not afford any protection against any changes in the law. For this reason, it was insisted by the Getty interests that the transaction be closed in the year 1947 in order not to risk a possible change in the law retroactive to the first of the year which would vitiate a closing agreement if the transaction were closed after the first of the year.

It was clear to both the Getty interests and Sunray that [372] any merger plan had to be fair and equitable to all of the corporations involved, and to their respective stockholders. The Getty interests stated, and it was also a position of Sunray that they would not be parties to any transaction unless the merger in all respects was fair and equitable. Apart from the ethical questions involved, no one connected with Sunray would be naive enough to believe that it would be possible to put through a merger which was not in all respects fair and equitable.

While the negotiations were going on, extensive studies were made of the respective businesses, assets, properties, oil reserves, earnings, production, future prospects and other relevant data as to all corporations concerned to arrive at a formula which would be fair and equitable to the stockholders of all of the corporations.

As soon as there was an accord as to the purchase of the stock of the Getty interests and we were assured by the bankers that the transaction was financially sound and feasible I commenced discussions with Mr. Staples, President of Pacific Western and a director of Mission management with a view to working out a merger. I advised Mr. Skelly as to the progress of the negotiations and requested that he come to California for a meeting with all parties concerned, including Mr. Lloyd Gilmour, but he declined to do so. After the agreement of October 4 for the purchase of the stock held by the Getty interests was signed, I returned to Tulsa and sought there to have Mr. Skelly coop-

erate in working out a merger formula, but it soon became apparent that he was opposing the idea of a merger on any terms, and that it would be useless to seek his cooperation any further.

After it became apparent that Mr. Skelly and the Skelly Oil Company, at his direction, would not cooperate in an endeavor to [373] work out a merger with Sunray, I discussed the matter with Sunray's directors and the bankers, and concluded that if any merger were to be worked out this year it would be necessary to eliminate Skelly Oil Company as a party to the merger. From a business viewpoint, while this result may not be as desirable, it does not actually affect the business reasons for merging the corporations. Eliminating the Skelly Oil Company as a party to the merger, but going ahead with the merger between Pacific Western, Mission Corporation and Sunray would achieve substantially the same result. Skelly Oil Company will become a subsidiary of the merged company and its business activities and properties can be integrated with the business activities and properties of the merged company in the same manner to all intents and purposes as if Skelly Oil Company itself were party to the merger, and the merged company and Skelly will enjoy the mutual benefits of such integration.

The following are examples of the mutual business benefits to be derived from the merger. As of August 31, 1947, Sunray was producing crude oil at a net rate in excess of twelve million barrels per year. Skelly Oil Company as of August 31, 1947, was producing at the net rate of in excess of fifteen

million barrels per year. Skelly's oil refineries have a capacity of approximately 32,000 barrels of oil per day, and when Sunray's new refinery at Duncan, Oklahoma, goes into production in the near future, Sunray's refineries will have a through-put capacity of in excess of thirty-six thousand barrels per day. The combined crude oil production of Sunray and Skelly Oil Company will insure the refineries of both companies a sufficient quantity of crude oil to permit their continuous operation. The crude oil production of both corporations can be used together not only to supply oil directly to the refineries, but for trading purposes with other oil companies to insure [374] a continuous flow of crude oil.

Skelly Oil Company has considerable production in the Velma field in Oklahoma, which is very near to Sunray's new refinery at Duncan, Oklahoma. This use of this production in the Duncan refinery will eliminate transportation charges to Skelly for the oil, and insure an outlet to Skelly Oil Company of its flush production in this field.

Perhaps the greatest advantage to Skelly of a combination of the business activities of both companies will be the ability for Skelly to obtain Sunray's production of gasoline and other refined products. Sunray itself maintains no retail gasoline stations, and therefore, has available a large quantity of gasoline and refined products. Skelly Oil Company, on the other hand, does not produce sufficient gasoline and refined products to satisfy the requirements of its marketing system. It has been having considerable difficulty in purchasing its require-

ments because of the acute gasoline shortage. It has a contract with Sunray at the present time to purchase seven and one-half million gallons of gasoline per year, and its marketing organization has continually sought to purchase more gasoline from Sunray. Sunray, however, must consider its future, and cannot make available to Skelly any substantial portion of its gasoline production without endangering its future ability to sell gasoline to other customers if the situation should change. If Skelly should become a subsidiary of Sunray, on the other hand, Sunray will have the assurance of Skelly's marketing system as a continual outlet for Sunray's production of gasoline and other refined products.

Skelly is also short of liquified petroleum gas, and for this very important adjunct of Skelly's business, Sunray can supply important quantities of this product to Skelly. [375]

Sunray and Skelly can take advantage of their combined resources in exploration and development work to their mutual advantage.

Sale of Tidewater Stock

I am advised that plaintiff has sought in its Complaint to stress the sale of Tidewater stock as a possible objection to the transaction. It was determined to sell Tidewater stock not only because it helps in financing the payment to the Pacific Western stockholders who are receiving cash, but because Tidewater is not essential from a business viewpoint to the merged company, and the merged company would not be justified in continuing so large an investment foreign to its business enterprise. More-

over, the Department of Justice has indicated clearly and unequivocably that it regards Tidewater as competitive to Skelly, and a combination of both of these companies under single control as a direct contravention to the anti-trust laws. If the merged company were to continue to hold the Tidewater stock, and indeed if the merger were not consummated, the continuance by Pacific Western and Mission to hold both Tidewater and Skelly would be to incur serious risks under the anti-trust laws. The Department of Justice might commence proceedings to compel a disposition of the Tidewater stock under circumstances and market conditions which might be much less favorable. In my opinion, the price of $25.00 per share for the price of the Tidewater stock is a fair and equitable price.

Ratio of Six Shares of Sunray to One Share of Mission

The ratio of six shares of Sunray to one share of Mission was arrived at after a very careful analysis and study by all parties concerned giving weight to all factors, including the debt and senior securities of the merged company. The analysis showed that after a merger on this basis, the Mission stockholders will have [376] securities representing a direct interest in the equity of the merged corporation, having a greater underlying value, and having greater earnings than they have at the present time, and with a greater market value than in the past.

Much stress is laid by the plaintiff on the value of Skelly Oil Company. It is significant, however,

that the minority stockholders of Mission Corporation do not sacrifice any substantial interest in Skelly Oil Company. At the present time they own fifty-three per cent (53%) of fifty-nine per cent (59%) of the stock of that Company. (The other forty-seven per cent (47%) is owned by Pacific Western Oil Corporation, and would be retired as part of the merger plan.) This gives the minority stockholders of Mission Corporation approximately a 31.27% interest in Skelly Oil Company. As a result of the merger, they lose about 3½% interest in Skelly Oil Company. They end up with a 47% interest in the merged company, including the 59% interest in Skelly Oil Company stock, or a 27.73% interest in Skelly Oil Company. In exchange for this relatively small decrease in their interest in Skelly Oil Company and the loss of their interest in Tidewater Associated Oil Company, they acquire a 47% direct interest in the very valuable assets of Pacific Western Oil Corporation and Sunray Oil Corporation, and all of the benefits of the integration of the operations of Skelly and Sunray. The debt and senior securities now existing in Sunray and resulting from the merger are reasonable and conservative in view of the values of the underlying assets and the earnings of the corporation. Unless this were true, it would not be possible for the corporation to borrow from banks at the rate of 1⅞% of the sum of $14,000,000.00 as it is planning to do, or to sell its debentures and preferred stock to the public with the reasonable interest and dividend rates contemplated. I am informed that [377] plaintiff has sought to create the impression that the

stock of Sunray is of "doubtful value." If this were true, it would not have been or be selling on the New York Stock Exchange at the substantial price, as is the case. An analysis of the underlying assets of Sunray Oil Corporation shows the properties of that company to be well in excess of its debt and senior securities, to more than justify its market price and support the 6 to 1 ratio. Annexed hereto, as Exhibit A, is an evaluation report of the properties of Sunray Oil Corporation and Pacific Western Oil Corporation giving effect to the merger of the two companies, prepared by Harold H. Wasson, an outstanding petroleum engineer of considerable renown and unquestioned integrity. Also annexed hereto is a proxy statement and notice of meeting of Sunray Oil Corporation, which as a further discussion of the business and assets of Sunray Oil Corporation, Pacific Western and Skelly Oil Company.

Payment of Dissenting Stockholders

I am advised that plaintiff alleges that stockholders who dissent and seek an appraisal of their shares run the risk that the corporation will not be financially able to pay them. I cannot emphasize too strongly how unsound this is in my opinion. The surviving corporation will have ample assets to pay any dissenting stockholders. If there was any danger of the corporation's inability to pay, it would not be possible to borrow money from banks or to obtain bankers to sell the debentures or to find customers to buy the debentures. Also,

as part of the transaction, there will be sold up to twenty-five million dollars of $100 par value convertible preferred stock. The rights of the dissenting stockholders will be paramount to those of the new preferred stockholders. Unless there were sufficient equity to warrant the sale of such preferred stock, it is obvious that the preferred stock could not [378] be sold.

Unless there is a sale of the debentures and preferred stock, and unless the loan is made by the banks, and unless there are ample assets to pay all dissenting stockholders the merger will not go through because the Boards of Directors of the three companies involved have reserved the right to abandon the merger. It would appear to be clear, therefore, that there is absolutely no risk or that the corporation will be unable to pay the dissenting stockholders in the event the merger is consummated.

Anti-Trust Allegations of the Complaint

I am advised that the Complaint contains certain Anti-Trust allegations. Mr. Skelly appeared before the Department of Justice, Anti-Trust Division, in person, and with Senator Burton K. Wheeler as his Counsel, urging the same contentions in an effort to get the Department of Justice to bring proceedings to enjoin the merger. I appeared before the Department of Justice with Counsel for Sunray, and pointed out the inaccuracies of the statements made by Mr. Skelly. There is no substantial competion between Skelly Oil Company and Sunray.

These companies complement or supplement each other and a combination of their activities would result in the creation of a strong, unified enterprise, the better able to meet the competition of large companies. Skelly Oil Company is a retail marketer of gasoline, critically in need of the production of gasoline which Sunray is able to give to Skelly Oil Company because Sunray itself does not distribute gasoline at retail. The combined resources, production and business of the two companies constitutes a very minor portion of the oil business in the United States. Accordingly, the Department of Justice refused to bring the injunction proceedings as requested by Mr. Skelly. Its determination in this regard was announced on [379] Friday, November 14, 1947.

All the Equities Are in Favor of Sunray Oil Corporation, Mission Corporation and Pacific Oil Corporation

Sunray Oil Corporation entered into the negotiations for this merger with the full knowledge and approval of this plaintiff and only when Sunray had obligated itself for substantial sums did this plaintiff evidence any opposition to the merger. It must be recalled that at that time he was not only president of Mission Corporation but Pacific Western Oil Corporation as well and was in the position by his mere approval or disapproval to direct the course of negotiations protecting those two companies. In view of his change of mind after these negotiations had worked to a point where it would

be difficult if not impossible to stop them, places this plaintiff in a very poor position to ask relief of a court of equity at this late date. Mr. Skelly is the owner of approximately 1% of the stock of Mission Corporation and it is inconceivable under the circumstances that he can come into this court and successfully block a merger which has been agreed by the majority of the boards of directors of the companies involved, particularly when the relief he seeks, that is, and injunction will impose undue financial losses on Sunray Corporation which cannot be recovered. Mr. Skelly's rights on the other hand are fully protected by the statutes of Nevada which furnish the complete answer to the demands of a dissenting stockholder. The law not only provides a remedy for a dissenting stockholder but empowers the courts to enforce this remedy. The amount of money Sunray Oil Corporation has been obligated to pay by reason of the voluminous records and documents which have been produced and printed, attorneys' fees, proxy statements and other expenses at the present time approximate $300,000.00.

Sunray Oil Corporation should be given every protection [380] by this great court of equity to avoid the consequences of this unwarranted litigation precipitated by one dissenting minority stockholder.

The basis of exchange is fair and equitable to the Mission stockholders in all respects. It was arrived at after careful consideration of all pertinent factors. The merger was prompted solely by business

reasons, and I believe it to be to the mutual advantage of the stockholders in all the constituent corporations. If any stockholder disagrees as to the business wisdom of the merger, or the fairness of the treatment he is receiving, the remedy provided by the laws of both Nevada and Delaware for the protection of the dissenting stockholders, in my opinion, affords adequate relief. If plaintiff is successful in obtaining the preliminary injunction he seeks, he will cause irreparable damage to many stockholders of both corporations who are in favor of the merger and who believe it to be to their mutual advantage to have it consummated.

Wherefore, I urge upon this Court that Plaintiff's application for a preliminary injunction in all respects be denied.

/s/ C. H. WRIGHT.

Sworn to before me this 20th day of November, 1947.

[Seal] /s/ MARGARET HUDSON,
Notary Public in and for Said County and State.

My Commission Expires: July 15, 1951.

Service by copy hereby is admitted this 20th day of November, 1947.

/s/ WM. WOODBURN,
/s/ JOHN P. THATCHER,
Attorneys for Plaintiff.

[Endorsed]: Filed Nov. 20, 1947. [381]

[Title of District Court and Cause.]

AFFIDAVIT OF FERO WILLIAMS

State of California,
County of Los Angeles—ss.

I, Fero Williams, being first duly sworn, depose and say:

That since about May 14, 1942, I have been and now am Assistant Secretary and Assistant Treasurer of Mission Corporation, a Nevada corporation, and I have been since on or about October 19, 1942, and now am a director of Mission Corporation. In addition, I have been since on or about December 16, 1940, and now am Assistant Secretary and Assistant Treasurer of Pacific Western Oil Corporation, a Delaware corporation, and I have been since October 20, 1947, and am now a director of Pacific Western Oil Corporation, and had also been a director of said corporation within the years 1932, 1934, 1935 and 1936. In addition, I have been since about [382] July, 1937, and now am a director of Skelly Oil Company, a Delaware corporation. In addition, during the years 1928 to 1946, inclusive, I was continuously an officer and/or director in many other corporations in which the Getty interests owned either all or a majority of the stock.

My duties over a period of twenty years in connection with services rendered for the referred to corporations included those of controllership, treasurer, accountant, handling all tax matters, executive operating committeeman, and financial analyst and advisor.

I have analyzed, passed upon and personally worked out many of the details of a number of mergers or reorganizations involving the above referred to corporations, the most recently completed merger being that of George F. Getty, Inc., into Pacific Western Oil Corporation on May 31, 1946.

Approximately a year ago, on my own initiative, I made a study and analysis of the possibility of a merger of Skelly Oil Company into Tide Water Associated Oil Company, at which time it was necessary to determine relative valuations of the stocks of these two companies. This study was discussed by me with D. T. Staples. Emil Kluth and T. A. J. Dockweiler.

Upon being advised in March or April of 1947 that Tide Water Associated Oil Company had made a cash offer of $68.00 per share for the purchase of Pacific Western Oil Corporation stock owned by the Getty interests, I made an analysis of the values of Pacific Western Oil Corporation, Mission Corporation, Tide Water Associated Oil Company and Skelly Oil Company, to ascertain that such purchase price was justified and supportable. My conclusion, as a result of such analysis, was that the $68.00 per share purchase price by Tide Water Associated Oil Company was justified by the values involved.

In April of 1947, during which time the negotiations [383] with Tide Water Associated Oil Company were being carried on, I was advised that an additional tentative proposal had been made by

Lloyd Gilmour to the effect that in the event the Tide Water Associated Oil Company deal was not consummated an offer of $58.00 per share would be made to the Getty interests for their Pacific Western Oil Corporation stock, but that such offer would be contingent upon a number of things, including some type of reorganization involving Pacific Western Oil Corporation, Mission Corporation, Skelly Oil Company and Sunray Oil Corporation. I did not go into this matter in detail at that time as I did not believe the Getty interests would be interested in selling their stock for $58.00 per share, and I was also at that time working upon a proposed merger of Pacific Western Oil Corporation into Mission Corporation. The conclusion I reached in my analysis of the proposed merger of Pacific Western Oil Corporation into Mission Corporation was that in the event such merger took place, the fair basis of exchange of shares would be approximately one share of Mission Corporation stock for one share of Pacific Western Oil Corporation stock.

At a later date, I believe in the month of July, 1947, I was advised that the negotiations with Tide Water Associated Oil Company for the purchase of Pacific Western Oil Corporation stock for $68.00 per share had been terminated, and that Lloyd Gilmour had submitted an offer of $68.00 per share for such stock, which offer was contingent upon several things, including the successful consummation of a proposed merger involving Pacific Western Oil Corporation, Mission Corporation, Skelly

Oil Company and Sunray Oil Corporation. It was rumored that the proposed merger would probably result in Mission Corporation stockholders being offered from five to six shares of Sunray Oil Corporation stock for each share of Mission, and Skelly Oil Company stockholders being offered from nine to ten shares of [384] Sunray Oil Corporation stock for each share of Skelly.

Knowing that the Getty interests had been agreeable to selling their Pacific Western Oil Corporation stock to Tide Water Associated Oil Company for $68.00 per share, I assumed that there was a probability of eventually proceeding with the rumored reorganization, so I undertook to make a detailed analysis and study of the relative values of the various corporations involved, the benefits which might accrue to the stockholders thereof, and of a tentative approximately fair basis of exchange of shares in the event such a merger would be submitted for approval. This analysis and study by me continued up to October 3, 1947, at which time I left Los Angeles for Texas. In the course of making such analysis I collaborated with Mr. Emil Kluth, who is Vice President in charge of the Geological Department of Pacific Western Oil Corporation, Vice President and director of Mission Corporation, director of Skelly Oil Company, and who had been director and president of many of the former Getty corporations referred to in the first paragraph of this affidavit, and with whom I have been closely associated in the oil business for the past twenty years.

My analysis indicated that the rumored basis of exchange of shares to be offered in the proposed merger might be approximately correct, but that if Skelly Oil Company was to be a party to the merger, it would probably require some months to accurately determine an exact fair basis of exchange of shares. Eliminating Skelly Oil Company as a party to the merger, however, indicated that the determination of a fair basis of exchange of shares of Sunray Oil Corporation stock for Mission Corporation stock would be a comparatively simple calculation. My computations had indicated that an exchange ratio of six to one was approximately the fair basis, subject to further verification and investigation of certain factors. My conclusions in this matter were discussed with Mr. Staples, Mr. Kluth, and probably [385] with Mr. Dockweiler and others prior to October 1, 1947.

While in Texas I conferred by telephone with both Mr. Staples and Mr. Dockweiler in connection with the progress being made and the developments arising in connection with the proposed merger. On October 13, 1947, Mr. Staples advised me that in all probabilities Skelly Oil Company would not be included in the proposed merger. I thereupon immediately contacted Mr. Robert Bradley, of the firm of DeGolyer and MacNaughton, with the request that he meet me in Tulsa on October 15, 1947, bringing with him all data he could obtain in connection with Sunray Oil Corporation. I arrived in Tulsa October 14, 1947, and immediately obtained various statements and data from Sunray Oil Corporation, including detailed evaluation report by Harold J.

Wasson, Consulting Engineer, as of March 31, 1946, prospectus of 1946, current operating and financial statements. I questioned various officers of Sunray Oil Corporation and reviewed with Mr. Raymond Kravis a current evaluation report showing tentative estimates of the oil and gas reserves of Sunray Oil Corporation. On October 15, 1947, in the presence of Mr. Dockweiler I questioned Mr. Bradley of DeGolyer and MacNaughton at considerable length upon his opinions as to the reserves, business, assets, etc., of Sunray Oil Corporation.

My first concern in analyzing my final checking of the exchange ratio of shares to be provided in the proposed merger was to determine that such exchange of shares of Sunray stock for Mission stock was fair and equitable to Mission stockholders.

My conclusion was that, after considering all factors involved, a proposed merger providing for the issuance of six shares of Sunray Oil Corporation stock for each share of Mission Corporation stock was fair and equitable to the holders of Mission Corporation stock, and that when such proposed merger was to be submitted to the Board of Directors of Mission Corporation the [386] same should be approved for submittal to the Mission Corporation stockholders for their approval or rejection.

These conclusions, and the reasons therefor, were discussed with Messrs. Staples, Boal, Dockweiler and Kluth prior to the meeting of October 18, 1947, and I had also expressed such conclusion to Mr. Hyden, but had not been afforded the opportunity

of explaining to him all of the factors and evaluations in connection therewith.

Since the meeting of October 18, 1947, Mr. D. T. Staples, President of Mission Corporation, has requested that I make a written report covering the bases and conclusions theretofore presented to him and Directors Dockweiler, Kluth and Boal. There is attached hereto copy of said report.

/s/ FERO WILLIAMS.

Subscribed and sworn to before me this 19th day of November, 1947.

[Seal] DOROTHY HENRY,
Notary Public in and for said County and State.
My commission expires May 29, 1949.

Service by copy admitted November 20, 1947.
/s/ WM. WOODBURN,
One of Attorneys for
Plaintiff. [387]

REPORT BY FERO WILLIAMS

November 18, 1947

D. T. Staples, President
Mission Corporation

Per your request I submit this report of my investigations, analyses, computations and conclusions in connection with the proposed merger of Pacific Western Oil Corporation and Mission Corporation into Sunray Oil Corporation, as approved by the Board of Directors of Mission Corporation on October 18, 1947.

The substance of the data contained herein had been discussed by me with you, Messrs. Kluth, Dockweiler and Boal prior to October 18, 1947.

FERO WILLIAMS.

Investigations and Analyses

A. In 1946 I made an analysis and study of the possibilities and probable results of a merger of Skelly Oil Company into Tide Water Associated Oil Company. In such study it was necessary to determine certain relative valuations of the stocks of these two companies. The fair ratio of my computed valuations of these two stocks at that time appeared to be approximately three shares of Tide Water Associated common stock for one share Skelly stock. This study and analysis was discussed with D. T. Staples, Emil Kluth, T. A. J. Dockweiler and possibly with others.

B. In the early part of the year 1947, upon being advised that Tide Water Associated had made a cash offer of $68.00 per share for the controlling stock interest in Pacific Western, I made an analysis of the values of Pacific Western based upon evaluations of its directly owned assets, and of the assets of Mission Corporation and Skelly. My conclusion, as a result of such analysis, was that the purchase price of $68.00 per share was justified and supportable by the values involved.

C. Thereafter, or at the same time, I was working on the details of a proposed merger of Pacific Western into Mission in order to determine a fair and equitable basis of exchange of shares. At that

time Mr. Skelly was President of Mission, and the minutes of the meeting of the Board of Directors of Mission held in Reno, Nevada, in May, 1947, refer to proceedings in connection with such proposed merger. When this particular merger was first contemplated, D. T. Staples, Arch H. Hyden, W. G. Skelly and I had a conference with E. DeGolyer, of the firm of DeGolyer and MacNaughton. This conference was held at the Waldorf Astoria Hotel in New York City, and at which conference the proposed merger was discussed with the firm of DeGolyer and MacNaughton [390] was employed to appraise and evaluate the properties of Pacific Western, but not the properties of Skelly, a subsidiary of Mission. From all recollections that I have of the discussions had at this conference it was not deemed necessary to appraise the properties of Skelly as that company was not to be a party to the merger. This was the same position that had been taken in the merger of George F. Getty, Inc., into Pacific Western as of May 31, 1946. prior to which time DeGolyer and MacNaughton had been employed to compute the equitable basis of exchange of shares. An appraisal was not made of the Skelly properties at that time. All my studies and analyses in connection with this proposed merger excluded computations of value of the properties of Skelly Oil Company. The conclusion I reached in such analyses was that in the event such merger took place, the fair basis of exchange of shares would be approximately one share of Mission stock for one share of Pacific Western stock. Such conclusion,

and basis therefor, was discussed with Messrs. Staples, Dockweiler, Kluth, Boal, Hyden and others.

D. I was advised that Tide Associated had been prevented by the anti-trust division of the Department of Justice from purchasing the Pacific Western Oil Corporation stock at $68.00 per share. I was also advised that Lloyd Gilmour had submitted several offers to the Getty interests to purchase their Pacific Western stock at a final offer price of $68.00 per share. This offer, as I understood it, was contingent, however, upon several things, including the successful consummation of a proposed merger involving Pacific Western, Mission, Skelly and Sunray Oil Corporation. It was rumored that the proposed merger would provide that Mission stockholders would be offered from five to six shares of Sunray stock for each share of Mission stock, and Skelly stockholders would be offered from nine to ten shares of Sunray stock for each share of Skelly stock. [391] Assuming that the price of $68.00 per share would probably be acceptable to the Getty interests, and further, that eventually proceedings would be taken in connection with the rumored reorganization, I undertook to make a detailed analysis and study of the relative values of the various corporations involved, of the benefits to be derived from such proposed merger, and of a tentative approximately fair basis of exchange of shares in the event such proposed merger should be submitted for approval.

These analyses were continued by me from July, 1947, to October 18, 1947. In the course of such analyses I conferred many times with Messrs.

Kluth, Staples, Dockweiler and others. This rumored proposed merger was well known in July, 1947, by all members of the Mission Board as articles about the same had appeared in newspapers and through brokerage office releases. In fact, it was discussed at the Skelly Board of Directors meeting in the month of July, and during such meeting Mr. Skelly dictated a news release in connection therewith. From prior experience in connection with various mergers I concluded that although the rumored basis of exchange of shares might be approximately correct, it would probably require some months to accurately determine an exactly fair basis of exchange of shares if Skelly was to be a party to the merger. By the elimination of Skelly as a party to the proposed merger, it appeared that fair basis of exchange of Sunray shares for Mission shares could be readily determined, particularly as such a determination would not necessitate an appraisal of the properties of Skelly. Prior to October 3, 1947, I had made an analysis from data available to me and my computations indicated that an exchange ratio of six shares of Sunray stock for one share of Mission stock was an approximately fair basis, subject of course to further investigations and verifications of certain factors involved in my calculations. My conclusions in this matter were discussed with Messrs. Staples and Kluth and others prior to October 3, 1947. [392]

E. I was in Texas from October 4 to October 13, during which time I conferred by telephone with

Mr. Staples several times and also with Mr. Dockweiler as to the progress being made and the developments arising in connection with the proposed merger. On October 13 Mr. Staples advised me by telephone that Skelly would in all probabilities be eliminated as a party to the proposed merger. I thereupon immediately contacted Mr. Robert Bradley of DeGolyer and MacNaughton with the request that he meet me in Tulsa on October 15, bringing with him all data he could obtain in connection with Sunray. He advised me at the time that, due to the various rumors he had heard, he had anticipated such a request and had been assembling such requested data for a period of about ten days prior to my request.

Upon arriving in Tulsa on October 14, I immediately obtained various statements and data from Sunray, including a detailed evaluation report made as of March 31, 1946, by Harold J. Wasson, consulting Engineer, a prospectus of Sunray which was used in its financing in 1946, and current operating and financial statements. I questioned various officers of Sunray, and conferred with Mr. Raymond Kravis, who was making a current evaluation report of Sunray, which included tentative current estimates of the oil and gas reserves of Sunray. Such tentative estimate, as shown by his calculations, was 185,000,000 barrels. I carefully analyzed all data and information. I had thus obtained, checking it with my previously accumulated knowledge or data in connection with Sunray. On October 15, in the presence of Mr. Dockweiler, I questioned Mr. Brad-

ley closely in connection with various data he had accumulated in connection with Sunray, and checked such data with that which I had in my possession. I also questioned him in connection with the assets of Sunray, its history, its reputation, its management, its business prospects and, more particularly, the reasonableness of the oil and gas reserves as set out in the report of March 31, 1946, by Mr. Wasson, and also as to the standing of Mr. Wasson as a Consulting Engineer. [393]

Until the meeting of October 18, 1947, I continued to check and recheck, and add to, my various computations and analyses supporting my conclusion that after considering all factors involved the exchange ratio of six shares of Sunray stock for one share of Mission stock was fair and equitable to all Mission stockholders.

My various computations, analyses, conclusions and reasons therefor were discussed at considerable length with Messrs. Staples, Boal, Dockweiler and Kluth prior to October 18, and I had also expressed such conclusions to Mr. Hyden, but had not been afforded the opportunity to explain to him in sufficient detail the calculations, bases therefor, etc., as he did not seem to be receptive to any arguments or recommendations that the proposed merger should be submitted to the Mission Board of Directors on October 18 for action thereon. He neither agreed nor disagreed with me as to my conclusions but indicated that if Mr. Skelly would oppose any voting upon the proposed merger agreement by the Board of Mission on October 18, he would vote with Mr. Skelly.

I did not attempt to contact Mr. Skelly and discuss this matter with him, as I felt that he was probably as well informed as I on the matter, and believed that he would not be receptive to any presentations by me, or be at all interested in my conclusions and analyses.

The foregoing has been a summary of my activities, and of the periods of time during which I had this matter, and other related matters, under consideration and study. There is set out hereafter in some detail under various captions a number of the factors taken into consideration by me in reaching my conclusions. [394]

Stock Market Values

Mission has approximately 30,000 stockholders. It is my conclusion that the principal interest and concern of a great majority of stockholders of large corporations are in the stock market quotations for their stock, and in their dividend receipts. The latter is quite often a factor governing the former.

There is attached hereto as Exhibit VI a statement showing the stock market high and low quotations for Mission, Skelly, Tide Water, Pacific Western and Sunray for each month from January, 1946, to September, 1947, inclusive. On referring to such statement it will be noted that for Mission the average high was $37.88 and the average low $32.84, and for Sunray the average high $10.63 and the average low $8.96. The statement also shows the the average middle points between the average highs and average lows. This figure was considered to be

a logical basis for comparing average market prices of the stocks shown on such statement. Such assumed average market price for Mission is $35.36 and for Sunray $9.80; therefore, the assumed market value of six shares at $9.80 is equal to $58.80, which is $23.44 greater than the $35.36. When reduced to percentages, it shows that $58.80 is 166% of $35.36.

A computation was then made that if one share of Mission stock had an average market price of $35.36 and it was converted into six shares of Sunray stock, which had an average price of $9.80, the Mission shareholders would gain $23.44 in average market price for their stock, or 66% gain.

My conclusion was that the market price of Mission stock on October 17, 1947 (that is, approximately $54.00) was not in any sense a true reflection of a normal market price for such stock. For quite some time the rumored proposed merger and approximate terms thereof had been a matter of public knowledge, particularly to traders in stocks. This, in my opinion, was the reason that Mission stock was selling for an abnormally high price in the month of October—that is, solely because of [395] reports of the proposed merger. Had there never been any public knowledge of such proposed merger, I believe that the market price of Mission stock would probably have been below $40.00.

On October 17, 1947, Sunray stock had a market value of approximately $11.50 per share. This was not an unusually inflated market value as compared with the then inflated market value of Mission.

(Refer to Exhibit VI.) Regardless of this apparent inequity in then existing market values, six shares of Sunray at $11.50, or $69.00, was $15.00 greater than the then abnormally inflated market value of $54.00 for one share of Mission, or 128% thereof, a gain of 28% in computed market values.

Assuming that there had been no considerations of any merger whatsoever, and further assuming that the $35.36 represented an average market price for Mission stock and $9.80 for Sunray stock, an exchange of shares based upon such market value assumptions would be that one share of Mission stock was worth 3.6 shares of Sunray stock, instead of the one to six basis set out in the proposed merger.

As a further analysis of market values of Mission stock, the following was considered. In 1946 DeGolyer and MacNaughton submitted the following data in a report in connection with the merger of George F. Getty, Inc., into Pacific Western:

Mission Corporation Stock

	Market High	Market Low	Dividends Paid
Year 1938	17–¾	10–⅝	$1.00
1939	14–⅞	8–¾	.65
1940	11–¾	7–⅛	.25
1941	15–½	9–⅜	.85
1942	14–¾	8–¾	.85
1943	25	13–⅝	1.00
1944	23–½	17–¾	1.25

From the above I made the following calculations:

Average highs 17-4/8, average lows 10⅞, average middle point 14, average dividend per year $.84.

There is an old and established stock market theory that stocks should sell for about twenty times their dividend payments. Twenty times the above computed average dividend rate of $.84 equals $16.80, an assumed normal expected market price for Mission stock on such theory. This computation, however, shows that Mission stock in the seven-year period covered by the report did not normally sell for twenty times its dividend rate, but only sixteen and two-thirds times. ($14.00 [market] divided by $.84 [dividend] equals sixteen and two-thirds.)

Using such past records as a basis of what Mission market value had been in relation to dividends, I checked it with the market values shown on Exhibit VI to ascertain a ratio for a more current period. In 1946 and 1947 Mission paid $1.50 per share dividends. The average market price was, per Exhibit VI, $35.36 per share, or 23.57 times its dividend rate. The following calculations were then made to determine possible or probable future market values of Mission stock in event there was no merger, and that its dividend payments might increase to the amounts as shown:

Dividend Rate	Computed Market Value at 23.57 Times Possible Dividend Rate	Computed Market Value at 16⅔ Times Possible Dividend Rate
$1.50	$35.36	$25.00
1.75	41.25	29.16
2.00	47.14	33.33
2.25	53.03	37.50
2.50	58.92	41.66

The above computations, with reference to the market values being 23.57 times the dividend rate,

are extremely optimtistic, however, when considering such possibilities of increased dividends and the market value remaining at 23.57 times dividends for this particular stock. Mission's income, which provides it with the funds with which to pay dividends, comes from dividends received from Skelly and Tide Water. The majority of such income is from Tide Water and there is no basis to expect the Tide Water dividends to substantially increase. That company has just advanced its annual dividend rate to $1.20 per share, and I do not expect any increase in the foreseeable future. Skelly, although reporting substantial book profits, has not had excess available funds from which to pay substantially increased dividends, and from my knowledge [397] of the affairs of that company and its cash requirements for its projected improvements to its refinery, its repressuring projects, development program, new gasoline plant investments, etc., I do not expect any substantial increase in its dividend payments. Therefore, as to the possible market value of Mission stock being projected at 23.57 times dividends, I believe this to be an erroneous assumption for two reasons. I believe that the average market value as shown in the statement in Exhibit VI has been influenced in this particular period of time by rumors of the proposed merger, beginning in the month of July, 1947, through September, 1947, and also, during the period from April, 1946, to July, 1946, when there were other rumors and speculations on the possibility of including Mission

in the merger of George F. Getty, Inc., into Pacific Western. If that merger had not occurred and if the present proposed merger had not become a matter of speculation, I do not believe that the average market price for Mission stock, as computed in Exhibit VI, would have been $35.36 per share, but would have been a smaller amount. It would probably have been closer to sixteen and two-thirds times the dividend rate, its average market price during the seven-year period from 1938 to 1944, inclusive, during which time there were no speculative rumors as to the possibilities of its becoming a party to a merger. The twenty to one ratio is usually applicable to computations of stock values of conservative companies, such as the Standard Oil Companies and similar companies, who retain a very substantial part of their earnings for reinvestment in their business, and thereby should appreciate the market value of their shares. Such is not the case with Mission as it pays out to its stockholders practically all of its income and therefore does not have a comparable element of possible appreciation attached to the market value of its stock. In normal times this should result in the market value of Mission stock more nearly approximating a sixteen and two-thirds to one ratio instead of the 23.57 to 1 ratio as shown, or even a 20 to 1 ratio. [398]

Mission is what is commonly known as a holding company, and practically all of the values of its assets are represented by ownership of Tide Water and Skelly stock. The market values of the stocks

of holding companies usually reflect a double discount of evaluations of indirect equity ownerships, and therefore the market values of stocks of holding companies are not as attractive as market values of companies which have direct ownership of assets. For example, refer to Exhibit VI, which shows Skelly stock average market price of $70.62, and Tide Water $20.46. Unquestionably, the net asset evaluations of each of these companies divided by the number of shares outstanding would produce an evaluation per share far in excess of the quoted market prices for the shares. The market values of stocks of even operating companies, therefore, represent substantial discounts of the computed underlying net assets of such companies.

The market values of holding companies are again discounted by the same process, reflecting a discount on a discount. Refer to Exhibit VI for calculations showing this further market discount of Mission stock. It has sold for discounts of approximately 30% of the market values for Tide Water and Skelly, which in themselves represent a substantial discount of computed net asset values of the companies. Obviously any merger which would place the ownership of assets by a corporation one step closer to ownership by the stockholders should eliminate a disadvantageous and actual double discount in the reflection of market values for such stock. This market advantage had been considered in a proposed merger of Pacific Western and Mission.

When considering:

a. That any Mission stockholder who did not wish to convert his shares to Sunray could not be forced to take stock in Sunray, but was protected by the laws of Nevada as to the value of his Mission stock;

b. That if a Mission stockholder wished to dispose of his Mission stock on the open market, he could probably realize a higher price for his shares than at any time in the past due to the abnormal increase in market values, resulting from the merger possibilities;

c. That a continuing Mission stockholder would receive Sunray stock having a market value far in excess of the computed normal market value of Mission ($35.36 per share);

d. That a continuing Mission stockholder would own stock in Sunray, which would not be a holding company to the same extent as Mission, and the future market values should not reflect a double discount of values;

e. That any appreciation in value of the present oil properties of Sunray or Pacific Western should be beneficial to the market values of Sunray stock to be received;

f. That those continuing Mission shareholders would not give up indirect equity ownership in assets of Skelly to any substantial percentage, but as stockholders of Sunray would probably eventually benefit in the market

value of Sunray upon possible future consolidation or liquidation of Skelly into Sunray with further eliminations of market discounts; and

g. That even if the Sunray stock to be received by the Mission stockholders, as a result of the merger, had a market value of only $7.00 per share, the total of $42.00 market value for six shares would represent as great or greater value than I would expect to be the market value of Mission stock in the event no merger is consummated, [400]

I came to the conclusion that the proposed merger, in which Mission stockholders would receive six shares of Sunray for each share of Mission, would be for the best interests of all Mission stockholders from a market value of stock standpoint, which is, in my opinion, the real yardstick which a stockholder uses in determining the actual value of his stock. [401]

Dividend Expectations by Mission Stockholders

The question of amount of dividends to be reasonably expected is, in my opinion, a very important consideration when analyzing the value of any stock. This is particularly true, I believe, from the standpoint of smaller stockholders, who may depend upon dividend income, and from the standpoint of investors seeking a fair or good return on their investment. There are approximately 30,000 stockholders of Mission, and undoubtedly many thousands of those stockholders are primarily interested

in the dividends which they might reasonably expect to receive.

Any expectation of dividends to be paid by Mission is contingent entirely upon a further expectation of dividends to be received by it from Tide Water and Skelly (See Exhibit IV-A). I do not anticipate any further increase in the recently increased dividend rate of $1.20 per share by Tide Water. It is possible that Skelly might gradually increase its present dividend rate of $2.50 per share, but I believe that $5.00 per share would be the maximum possible amount.

Exhibit VIII, attached hereto, is a computation of reasonable dividend expectancies of $2.00 or $3.00 per share to present Mission shareholders, providing that Mission pays out practically all of the earnings as computed in said statement.

Exhibit IX, attached hereto, is a computation of reasonable dividend expectancies of $3.78 or $4.26 to present Mission shareholders if the merger is approved and six shares of Sunray stock received. These amounts represent only one-half of the computed net income of Sunray being distributed.

Exhibit X, attached hereto, is a computation similar to those in Exhibit IX, and shows such reasonable expectancies as being $3.63 or $4.11.

Upon comparing the information set out in Exhibits VIII, IX and X, I concluded that the proposed merger, providing for an exchange of six shares of Sunray stock for one share of Mission stock, would give the present stockholders of Mis-

sion an opportunity to increase their dividend income by at least 50%. [402]

Status of Mission Corporation

A reference to Exhibit IV will show that Mission is what is commonly termed a "holding company."

Of the 1,374,145 shares outstanding, Pacific Western owns 641,808 shares, or approximately 47%. The Getty interests in turn own approximately 85% of Pacific Western. It can be seen that Mission is in the proximity of being classed as a "personal holding company."

As either a "holding company" or a "personal holding company," there is little probability that Mission could materially increase its directly owned equity investments. Its value therefore depends, to a major extent, upon the market value of Skelly and Tide Water stocks, a factor which is not within the control of Mission's management. Its source of income (See Exhibit IV-A) depends upon the dividends declared by Tide Water and Skelly. Any great appreciation of any assets owned by Tide Water or Skelly is doubly discounted in the reflection thereof in the market values of Mission stock.

There have been from time to time discussions as to the possibility of some judicial order or regulation which might require Mission to divest itself of its Tide Water stock, which might be very detrimental to the values of Mission stock.

The disadvantageous status of Mission has for a number of years been under frequent discussion.

It cannot be dissolved under Nevada law without the affirmative vote of two-thirds of the stockholders, and there is no possibility of this, as Pacific Western owns approximately 47% of the Mission stock and could not, from a practical standpoint, agree upon a dissolution of Mission.

Many stockholders of Mission have from time to time expressed a desire for the opportunity of "cashing in" on their Mission stock at values greater than the normal market values which were subject to double discounts. This proposed merger gives such stockholders the first opportunity to do so. [403]

After due donsiderations of these factors, which I considered to be disadvantageous or detrimental to the market value of Mission stock, I concluded that a submission of the proposed merger to the Mission stockholders was highly advisable so that each stockholder would have an opportunity to make his own decision as to his personal desires in the matter. [404]

Continuing Equity Interest of Mission Stockholders Using Certain Stock Values

An analysis of the continuing equity interest of present Mission stockholders was made. Refer to Exhibit VII, which shows that the present Mission shareholders have a 53.294% indirect equity ownership of the net assets of Mission. After the merger they would have a 47.1596% indirect equity ownership of the net assets of Sunray.

Exhibit XI was prepared to show an evaluation of such indirect equity ownership. This statement has four separate calculations. It shows Skelly stock at the then market of $91, and further arbitrary market values of $125, $150 and $175 per share for such stock. By using such stock market values, the statement shows arbitrary values per share of $64.35, $78.77, $89.37 and $99.97.

Exhibit XII was prepared to show a similar or comparable evaluation of six shares of Sunray, following the proposed merger. Such computations show $67.74, $80.52, $89.88 and $99.24. It will be noted from such Exhibit XII that the price of $11.50 per share for Sunray stock value was constant in all four calculations, whereas Skelly stock value was increased, which was to offset any possible contention that the market value of Skelly stock was not as closely approximating the real underlying value of the stock as the market value of Sunray stock was to its real underlying value.

The results of this investigation and analysis further substantiated the fairness of the six to one basis of exchange, [405]

Continuing Equity Interest of Mission Stockholders in Skelly and Tide Water Stock Values

As shown in Exhibit VII, the continuing Mission stockholders would have a 47.15796% of the stock of Sunray, in lieu of the present 53.294% of the stock of Mission.

Exhibit XIII was prepared to show this continuing equity in the values of Tide Water and

Skelly stock, including the 47.15796% interest that Mission stockholders would acquire in the 577,854 shares of Tide Water now owned by Pacific Western. This statement contains various computations, calculations and comments which should be conclusive evidence that Mission shareholders should gain a substantial equity in market values of the two stocks, as a result of the merger. Such gain should be an amount between the amount of $1,494,483, as shown in A of page 1 of Exhibit XIII, and the amount of $278,714, as shown in B of the same statement, the amount of gain being determined by the fluctuations of the market values of Tide Water and Skelly. [406]

Acquiring Equity Interests of Mission Stockholders Other Than Tide Water and Skelly Stocks

In the prior comments on Page 19, it was assumed that the continuing equity interest of Mission stockholders would not be adversely affected as to Tide Water and Skelly stocks when considering the combined values thereof.

Exhibit XIV shows various calculations made indicating that other equity values acquired more than offset indirect assumption of $100,000,000 new debt.

I concluded that the computed net gain of $22,738,285 equity values over assumed liabilities was ample protection to Mission shareholders verifying this phase of the fairness of the exchange ratio of six to one. [407]

Evaluation Statements

Evaluation statements were prepared to show an evaluation of the shares of Sunray, Mission, Pacific Western and also Skelly. Such statements (attached hereto) and figures shown thereon are summarized as follows:

Company	Exhibit	Net Evaluation	Per Share
Sunray	XV	$104,625,043	$ 21.25
Skelly	XVI	$231,134,482	$235.53
Mission	XVII	$172,636,568	$125.63
Pacific Western	XVIII	$135,211,335	$ 98.57

These evaluation exhibits include therein explanations of the methods I used in my evaluations, the source of my information, and the basis for using such methods of evaluating assets. Although such methods may not be strictly in accordance with more conventional types of evaluation reports, I felt that the same were just as practical in arriving at a reasonable answer, which was in itself merely a substantiation of prior conclusions.

From the above calculated evaluations per share it can be seen that the ratio of Mission $125.63 to Sunray $21.25 is 5.91 to 1, instead of the 6 to 1 in the proposed merger. This computation verifies, from this phase of my analyses, that the proposed merger ratio of 6 to 1 is fair and equitable to Mission stockholders. [408]

Consolidation of Evaluations of Sunray, Mission, Pacific Western

The following computations and comments may be of interest.

Sunray evaluation	Exhibit XV	$104,625,043 or $ 21.25 per share	
Mission evaluation	Exhibit XVII	$172,636,568 or $125.63 per share	
Pacific Western evaluation	Exhibit XVIII		
Total		$135,211,335	
Less Mission included		80,630,339	54,580,996
Subtotal			$331,842,607
Less Debt & Merger Costs			100,000,000
Evaluation of 9,317,668 Shares			$231,842,607
Value Per Share			$24.88

This shows an increase of $3.63 for Sunray ($24.88 less $21.25)

This shows an increase of $23.65 for six shares of Sunray over the $125.63 for one share of Mission.

It appears that the evaluations of Sunray applicable to the entire 9,317,668 shares will increase $3.63 per share, or $33,846,770, as a result of the merger.

This would be true, as the Pacific Western evaluations shown in Exhibit XVIII of $135,211,335 are being purchased for $93,300,000. Evaluations are also reduced by the costs of the merger.

Both present Sunray and Mission shareholders benefit in evaluation increases due to the purchase of Pacific Western stock at a discount of such evaluation amounts. [409]

EXHIBIT I

Mission Corporation
Balance Sheet

August 31, 1947

Assets

Current Assets			
Cash in Banks and on Hand		$ 1,335,829.82	
U. S. Gov't Securities (at cost)		100,000.00	
Accounts Receivable		354,281.57	
Inventories—Crude Oil		422.24	$ 1,790,533.63
Investment in Other Companies			
1,345,593 shares Tide Water Assoc. @ $10.36		$13,938,216.29	
582,657 shares Skelly Oil @ $7.2947		4,250,289.45	18,188,505.74
Fixed Assets			
Leases	$ 208,988.84		
Royalties	65,973.85		
	274,962.69		
Less: Reserves	181,248.28	93,714.41	
Intangible Development Costs	$ 56,107.40		
Less: Reserves	56,107.40		
Plant and Equipment	$ 79,718.69		
Less: Reserves	56,236.91	23,481.78	
Furniture & Fixtures	$ 2,608.00		
Less: Reserves	180.00	2,428.00	119,624.19
Total Assets			$20,098,663.56

Liabilities

Current Liabilities			
Accounts Payable		$ 2,298.15	
Accrued Taxes—Misc.		433.01	
Accrued Taxes Withheld on Dividends		1,746.94	
Reserve for Federal Income Taxes		184,386.82	$ 188,864.92
Capital Stock and Surplus			
Capital Stock $10.00 par value—			
1,500,000 Authorized			
Issued 1,379,545 shares @ $10.00		$13,795,450.00	
Earned Surplus			
Earned Surplus 1/1/47	$5,535,831.99		
Profit 1947 to 8/31/47	1,673,417.90		
	$7,209,249.89		
Less: Dividend Paid 6/30/47	1,030,608.75	6,178,641.14	
		$19,974,091.14	
Less: 5,400 shares Common Stock in Treasury		64,292.50	
1,374,145 Common shares Outstanding and Surplus			19,909,798.64
Total Liabilities			$20,098,663.56

EXHIBIT I-A

Mission Corporation
Statement of Income
Eight Months Ended August 31, 1947

Oil Operations			
Habiger Lease Sales–Gross	$ 155,404.38		
Less Royalties	36,313.53		
Net Sales	$ 119,090.85		
Other Lease Income	64.00		
Subtotal		$ 119,154.85	
Less:			
Production Expense	$ 9,562.49		
Depreciation	3,367.00		
Depletion	7,160.00	20,089.49	
Habiger Lease Net Income		$ 99,065.36	
Depletion of Royalty Interests	$ 6,520.00		
Less Royalties Received	2,393.96		
Net Loss Royalties		4,126.04	
Net Income Oil Operations			$ 94,939.32
Other Income and Expense			
Income			
Dividends			
Tide Water Associated	$1,009,194.75		
Skelly Oil Company	728,321.25	$ 1,737,516.00	
Interest—			
Government Securities		2,105.40	
Total Other Income		$ 1,739,621.40	

Expenses			
Executive and General Expenses	$ 35,402.93		
New Jersey Offices—Net	753.88		
Stock Record's Office	12,368.02		
Nevada Office	5,480.15		
Registrar Expense	658.90		
Transfer Agents' Expense	644.06		
Taxes Other Than Federal Income	4,834.88		
Total Other Expenses		$ 60,142.82	
Net Other Income			1,679,478.58
Net Income Before Federal Income Taxes			$1,774,417.90
Less Provision for Federal Income Taxes			101,000.00
Net Income for Period			$1,673,417.90

EXHIBIT II

Pacific Western Oil Corporation
Consolidated Comparative Balance Sheet
August 31, 1947

Assets

	August 31 1947	July 31 1947	Increase Decrease–
Current Assets			
Cash	$ 2,767,057.55	$ 2,779,000.16	$ 11,942.61–
U. S. Government Securities	630,385.36	630,390.66	5.30–
Notes Receivable	89,072.00	89,072.00	
Accounts Receivable	897,622.53	839,605.44	58,017.09
Dividends Receivable— Tide Water Assoc. Oil Co.	144,463.50		144,463.50
Inventories	653,824.48	627,443.69	26,380.79
Total Current Assets	$ 5,182,425.42	$ 4,965,511.95	$216,913.47
Investments in Common Stocks			
Mission Corporation (46.71%) 641,808 Shares at $15.50	$ 9,947,084.88	$ 9,947,084.88	
Tide Water Associated Oil Co. 577,854 Shares at $6.80	3,927,006.95	3,927,006.95	
Other	112.00	112.00	
Total Investments (At Cost)	$13,874,203.83	$13,874,203.83	
Fixed Assets			
Lands, Leases, Royalties	$13,366,947.44	$13,337,569.25	$ 29,378.19
Less Reserves	7,395,283.47	7,373,499.21	21,784.26
Net	$ 5,971,663.97	$ 5,964,070.04	$ 7,593.93
Equipment and Drilling Costs	$23,514,247.66	$23,286,499.50	$227,748.16
Less Reserves	18,981,898.75	18,943,382.82	38,515.93
Net	$ 4,532,348.91	$ 4,343,116.68	$189,232.23
Subtotal	$10,504,012.88	$10,307,186.72	$196,826.16
Hotel Properties (Including land cost of $1,000,000)	$ 3,318,198.09	$ 3,262,842.28	$ 55,355.81
Less Reserves	647,392.73	633,712.79	13,679.94
Net	$ 2,670,805.36	$ 2,629,129.49	$ 41,675.87
Net Fixed Assets	$13,174,818.24	$12,936,316.21	$238,502.03
Organization & Merger Costs..	$ 314,500.78	$ 314,500.78	
Less Reserves	197,325.85	194,396.48	$ 2,929.37
Net	$ 117,174.93	$ 120,104.30	$ 2,929.37–
Prepaid and Deferred Charges Rentals, Taxes, Insurance, etc.	$ 354,972.16	$ 358,133.20	$ 3,161.04–
Total Assets	$32,703,594.58	$32,254,269.49	$449,325.09

Pacific Western Oil Corporation
Consolidated Comparative Balance Sheet
August 31, 1947

Liabilities

	August 31 1947	July 31 1947	Increase Decrease–
Current Liabilities			
Accounts Payable	$ 816,987.66	$ 672,824.09	$144,163.57
Royalties Payable	175,911.64	165,886.07	10,025.57
Wages Payable	33,670.64	41,446.54	7,775.90–
Interest Payable	25,203.13	24,504.38	698.75
Misc. Accrued Liabilities	32,387.44	49,242.74	16,855.30–
Taxes Accrued— Other than Income	147,299.74	90,814.90	56,484.84
Provision for Federal and State Income Taxes	297,318.36	296,468.36	850.00
Total Current Liabilities	$ 1,528,778.61	$ 1,341,187.08	$187,591.53
Deferred Credits	$ 652.54	$ 887.16	$ 234.62–
Capital Stock and Surplus			
Capital Stock—$10.00 Par Value Common 2,000,000 Shares Authorized 1,376,430 Shares Issued at $10.00	$13,764,300.00	$13,764,300.00	
Surplus			
Paid In Surplus	$ 5,382,136.54	$ 5,382,136.54	
Earned Surplus			
January 1, 1947, adjusted	$ 9,857,636.60	$ 9,857,636.60	
Profit Year to Date..	2,270,930.94	2,008,962.76	$261,968.18
	$12,128,567.54	$11,866,599.36	$261,968.18
Total Surplus	$17,510,704.08	$17,248,735.90	$261,968.18
Total Capital Stock & Surplus	$31,275,004.08	$31,013,035.90	$261,968.18
Less 4700 Shares Common Stock in Treasury	100,840.65	100,840.65	
1,371,730 Common Shares Outstanding & Surplus (Per Share $22.73)	$31,174,163.43	$30,912,195.25	$261,968.18
Total Liabilities	$32,703,594.58	$32,254,269.49	$449,325.09

EXHIBIT II-A

Pacific Western Oil Corporation

Consolidated Comparative Statement of Income

August 31, 1947

Gross Operating Income

	Month of August	Month of July	Year 1947 to Date
Net Sales and Royalties	$574,589.46	$587,420.75	$3,998,396.28
Other Operating Income	18,399.38	14,941.45	105,028.23
Total Operating Income	$592,988.84	$602,362.20	$4,103,424.51
Operating Charges			
Operating Expense—Net	$101,298.89	$100,030.89	$ 764,193.28
Undeveloped Lease, Rent & Expense	22,790.54	27,694.73	211,827.47
Exploration Work and Unproductive Wells	209,714.26*	195,840.75	828,970.68
Office Expense:			
Los Angeles Office	28,937.08	29,309.18	225,069.57
Delaware Office	947.09	2,346.77	7,006.61
New Jersey Office			13,560.76
Skelly Oil Co. Charges	1,689.54	1,581.22	13,549.88
Rocky Mountain Area	7,542.89	9,525.76	54,110.92
Tide Water Assoc. Oil Co. Charges	9,629.79	6,698.19	92,558.33
General Taxes, Insurance, etc.	6,212.76	6,256.97	72,640.56
	$388,762.84	$379,284.46	$2,283,488.06
Operating Income Before Reserves	$204,226.00	$223,077.74	$1,819,936.45

Reserve Provisions			
Depreciation	$ 36,620.61	$ 36,384.15	$ 289,974.97
Depletion	29,045.54	29,008.57	227,942.62
Abandonments, etc.	30,000.00	30,000.00	240,000.00
Intangible Development Costs	12,000.00	62,560.06	102,000.00
Amortization of Organization & Merger Costs	2,929.37	2,929.37	23,434.96
	$110,595.52	$160,882.15	$ 883,352.55
Profit or Loss from Operations	$ 93,630.48	$ 62,195.59	$ 936,583.90
Other Income and Deductions			
Gain on Sale of Capital Assets	$ 500.00–		$ 88,027.57
Dividends Earned	144,463.50		914,746.50
Interest Earned	1,196.23	$ 1,104.56	9,546.84
Interest Expense	698.75–	698.75–	4,912.45–
	$144,460.98	$ 405.81	$1,007,408.46
Net Income Before Net Income of Subsidiary Company and Federal Income Tax	$238,091.46	$ 62,601.40	$1,943,992.36
Net Income of Subsidiary Company Getty Realty Corporation	$ 24,726.72	$ 10,780.12–	$ 375,788.58
Net Income Before Federal Income Taxes	$262,818.18	$ 51,821.28	$2,319,780.94
Provision for Federal Income Taxes	850.00	1,300.00–	48,850.00
Net Income for the Period	$261,968.18*	$ 53,121.28	$2,270,930.94
Earnings Per Share	$.19	$.04	$1.66

* Includes $175,000.00 provision for possible future dry hole well costs Gordon Creek, Mott #3, McKittrick #73-30 and Tide Water Leases.

EXHIBIT III

Sunray Oil Corporation
(Delaware)
Tulsa, Oklahoma

Balance Sheet

As at August 31, 1947

Assets		
Current Assets		
Cash on hand and demand deposits	$ 8,364,460.55	
U. S. Government Bonds	2,062,000.00	
Accounts and Notes Receivable (less reserves)	3,590,588.18	
Inventories	1,844,245.81	$15,861,294.54
Cash Surrender Value of Life Insurance		120,770.25
Contractual Accounts Receivable		43,313.51
Investments in Other Securities		663,001.00
Property Accounts		
Leaseholds, royalties, transmission and pipe line systems, refinery, development costs and other equipment	125,483,478.08	
Less: Reserves for depreiation and depletion	45,429,292.05	80,054,186.03
Prepaid Items		237,387.08
Total Assets		$96,979,952.41
Liabilities		
Current Liabilities		
Accounts Payable	$ 2,085,864.09	
Notes Payable	1,000,000.00	
Dividends Payable	292,174.35	
Accrued Pay Rolls, Interest, Insurance & Misc. Taxes	437,145.55	
Provision for Federal and State Income Taxes	1,721,339.73	
Commissions Payable	108,833.47	5,645,357.19

Notes Payable—Deferred			8,000,000.00
Twenty Year 2⅞% Sinking Fund Debentures—Final Due Date July 1, 1966			20,000,000.00
Commissions Payable—Due After Twelve Months from This Date			1,119,667.46
Reserves:			
For Possible Additional Assessments of Income Taxes and Interest Thereon—Prior Years			537,670.19
Losses from Dry Holes, Forfeited Leases, etc.			122,623.94
Capital Accounts			
Capital Stock	Authorized		
Common	$ 5,000,000.00	$ 4,689,185.80	
Preferred	27,000,000.00	26,189,360.00	
		30,878,545.80	
Surplus			
Capital	$17,647,478.18		
Earned	13,028,609.65	30,676,087.83	61,554,633.63
Total Liabilities			**$96,979,952.41**

EXHIBIT III-A

Sunray Oil Corporation
(Delaware)
Tulsa, Oklahoma

Statement of Profit & Loss

Eight Months Ended August 31, 1947

Gross Operating Income	$23,586,745.80
Deduct: Costs (Including oil sold to refinery, operating and general expenses, taxes, etc.)	10,372,485.64
Net Operating Income	$13,214,260.16
Add: Other Income (Interest, discounts, bonuses, etc.)	76,280.23
Total	$13,290,540.39
Deduct: Nonoperating Charges (Including interest and discounts)	591,540.13
Balance	$12,699,000.26
Deduct: Capital Extinguishments, Leases Abandoned, Dry Holes, Etc.	976,474.94
Net Income: Before Current Year Reserves for Depreciation, depletion and Taxes	$11,722,525.32
Provision for Depreciation and Depletion	3,320,000.00
Net Income: Before provision for Income Taxes	$ 8,402,525.32
Provision for Income Taxes	1,400,000.00
Net Profit	$ 7,002,525.32

EXHIBIT IV

Mission Corporation

Balance Sheet

September 30, 1947

Assets

Current Assets		
Cash		
U. S. Govt. Securities	$ 1,642,333.49	
Accounts Receivable and Accruals	100,000.00	
Inventories—Crude Oil	18,091.67	
	422.24	
		$ 1,760,847.40
Investments in Other Companies		
Tide Water Associated Oil Co.		
1,345,593 shares @ $10.36	$13,938,216.29	
Skelly Oil Co.		
582,657 shares @ $7.2947	4,250,289.45	
		18,188,505.74
Fixed Assets		
Leases, royalties, equipment and drilling costs	$ 413,396.78	
Less: Reserves	295,957.59	
		117,439.19
Total Assets		$20,066,792.33

Liabilities

Current Liabilities		
Accrued Federal Income Tax	$ 147,955.23	
Accrued Taxes—Other	1,763.89	
Accounts Payable	1,600.77	
		$ 151,319.89
Capital Stock and Surplus		
Capital Stock—Par Value $10.00 Per Share		
Authorized—1,500,000 shares		
Issued—1,379,545 shares	$13,795,450.00	
Earned Surplus	6,184,314.94	
	$19,979,764.94	
Less: Shares in Treasury—at cost (5,400)	64,292.50	
1,374,145 Shares Outstanding and Surplus		19,915,472.44
Total Liabilities		$20,066,792.33

EXHIBIT IV-A

Mission Corporation
Statement of Income
Nine Months Ended September 30, 1947

Oil Operations			
Gross Operating Income After Royalties—			
Habiger Lease		$ 136,001.52	
Operating Charges			
Production Expense	$ 10,041.36		
Depreciation	3,792.00		
Depletion	8,060.00	21,893.36	
Net Income— Habiger Lease		$ 114,108.16	
Depletion on Royalty Interests	$ 7,320.00		
Less: Royalties Received	2,723.69		
Net Loss— Royalties		4,596.31	
Net Income—Oil Operations			$ 109,511.85
Other Income and Expense			
Dividends			
Tide Water Associated Oil Co.	$1,009.194.75		
Skelly Oil Company	728,321.25	$1,737,516.00	
Interest		2,313.75	
Total Other Income		$1,739,829.75	
General and Administrative Expense		64,249.90	
Net Other Income			1,675,579.85

Net Income Before Federal Income Taxes	$1,785,091.70
Less Provision for Federal Income Taxes	106,000.00
Net Income for Period	$1,679,091.70
Earned Surplus Reconcilement	
Balance, January 1	$5,535,831.99
Add: Profit for nine months ended September 30	1,679,091.70
	$7,214,923.69
Less: Dividend Paid June 30	1,030,608.75
Balance, September 30	$6,184,314.94

EXHIBIT V

Pacific Western Oil Corporation
Consolidated Comparative Balance Sheet
September 30, 1947

Assets

	Sept. 30 1947	August 31 1947	Increase Decrease–
Current Assets			
Cash	$ 2,833,833.84	$ 2,767,057.55	$ 66,776.29
U. S. Government Securities	630,380.06	630,385.36	5.30–
Notes Receivable	89,040.00	89,072.00	32.00–
Accounts Receivable	829,393.21	897,622.53	68,229.32–
Dividends Receivable—Tide Water Assoc. Oil Co.		144,463.50	144,463.50–
Inventories	663,592.70	653,824.48	9,768.22
Total Current Assets	$ 5,046,239.81	$ 5,182,425.42	$136,185.61–
Investments in Common Stocks			
Mission Corporation (46.71%) 641,808 Shares at $15.50	$ 9,947,084.88	$ 9,947,084.88	
Tide Water Assoc. Oil Co. 577,854 Shares at $6.80	3,927,006.95	3,927,006.95	
Other	112.00	112.00	
Total Investments (at Cost)	$13,874,203.83	$13,874,203.83	
Fixed Assets			
Lands, Leases, Royalties	$13,443,207.96	$13,366,947.44	$ 76,260.52
Less: Reserves	7,439,163.61	7,395,283.47	43,880.14
Net	$ 6,004,044.35	$ 5,971,663.97	$ 32,380.38
Equipment and Drilling Costs	$23,685,403.37	$23,514,247.66	$171,155.71
Less Reserves	18,984,502.26	18,981,898.75	2,603.51
Net	$ 4,700,901.11	$ 4,532,348.91	$168,552.20
Sub-total	$10,704,945.46	$10,504,012.88	$200,932.58
Hotel Properties (Including Land Cost of $1,000,000)	$ 3,258,615.38	$ 3,318,198.09	$ 40,417.29
Less Reserves	661,072.67	647,392.73	13,679.94
Net	$ 2,697,542.71	$ 2,670,805.36	$ 26,737.35
Net Fixed Assets	$13,402,488.17	$13,174,818.24	$227,669.93
Organization and Merger Costs	$ 314,500.78	$ 314,500.78	
Less Reserves	200,255.22	197,325.85	$ 2,929.37
Net	$ 114,245.56	$ 117,174.93	$ 2,929.37–
Prepaid and Deferred Charges Rentals, Taxes, Insurance, etc.	$ 415,972.34	$ 354,972.16	$ 61,000.18
Total Assets	$32,853,149.71	$32,703,594.58	$149,555.13

Pacific Western Oil Corporation
Consolidated Comparative Balance Sheet
September 30, 1947

Liabilities

	Sept. 30 1947	August 31 1947	Increase Decrease–
Current Liabilities			
Accounts Payable	$ 755,047.04	$ 816,987.66	$ 61,940.62–
Royalties Payable	167,083.94	175,911.64	8,827.70–
Wages Payable	45,254.67	33,670.64	11,584.03
Interest Payable	41,901.88	25,203.13	16,698.75
Misc. Accrued Liabilities	32,016.10	32,387.44	371.34–
Taxes Accrued—Other Than Income	199,175.42	147,299.74	51,875.68
Provision for Federal and State Income Taxes	327,468.36	297,318.36	30,150.00
Total Current Liabilities	$ 1,567,947.41	$ 1,528,778.61	$ 39,168.80
Deferred Credits	$ 3,349.45	$ 652.54	$ 2,696.91
Capital Stock and Surplus			
Capital Stock—$10 Par Value Common 2,000,000 Shares Authorized 1,376,430 Shares Issued at $10	$13,764,300.00	$13,764,300.00	
Surplus			
Paid in Surplus	$ 5,382,136.54	$ 5,382,136.54	
Earned Surplus January 1, 1947, adjusted	$ 9,857,636.60	$ 9,857,636.60	
Profit Year to date	2,378,620.36	2,270,930.94	$107,689.42
	$12,236,256.96	$12,128,567.54	$107,689.42
Total Surplus	$17,618,393.50	$17,510,704.08	$107,689.42
Total Capital Stock and Surplus	$31,382,693.50	$31,275,004.08	$107,689.42
Less 4700 Shares Common Stock in Treasury	100,840.65	100,840.65	
1,371,730 Common Shares Outstanding and Surplus	$31,281,852.85	$31,174,163.43	$107,689.42
(Per Share $22.80)			
Total Liabilities	$32,853,149.71	$32,703,594.58	$149,555.13

EXHIBIT V-A

Pacific Western Oil Corporation
Consolidated Comparative Statement of Income
September 30, 1947

	Month of Sept., 1947	Month of August, 1947	Year 1947 To Date
Gross Operating Income			
Net Sales and Royalties	$597,301.34	$574,589.46	$4,595,697.62
Other Operating Income	7,251.33	18,399.38	112,279.56
Total Operating Income	$604,552.67	$592,988.84	$4,707,977.18
Operating Charges			
Operating Expense—Net	$ 96,198.74	$101,298.89	$ 860,392.02
Undeveloped Lease Rent and Expense	28,388.20	22,790.54	240,215.67
Exploration Work and Unproductive Wells	216,087.70*	209,714.26	1,045.058.38
Office Expense:			
Los Angeles Office	28,588.87	28,937.08	253,658.44
Delaware Office	1,717.53	947.09	8,724.14
New Jersey Office			13,560.76
Skelly Oil Co. Charges	1,221.04	1,689.54	14,770.92
Rocky Mountain Area	9,618.84	7,542.89	63,729.76
Tide Water Assoc. Oil Co. Charges	6,372.82	9,629.79	98,931.15
General Taxes, Insurance, etc.	35,209.84	6,212.76	107.850.40
	$423,403.58	$388,762.84	$2,706,891.64
Operating Income Before Reserves	$181,149.09	$204,226.00	$2,001,085.54

Reserve Provision			
Depreciation	$ 39,959.15	$ 36,620.61	$ 329,934.12
Depletion	31,285.04	29,045.54	259,227.66
Abandonments, etc.	30,000.00	30,000.00	270,000.00
Intangible Development Costs	18,000.00–	12,000.00	84,000.00
Amortization of Organization and Merger Costs	2,929.37	2,929.37	26,364.33
	$ 86,173.56	$110,595.52	$ 969,526.11
Profit or Loss From Operations	$ 94,975.53	$ 93,630.48	$1,031,559.43
Other Income and Deductions			
Gain on Sale of Capital Assets		$ 500.00–	$ 88,027.57
Dividends Earned		144,463.50	914,746.50
Interest Earned	$ 1,083.71	1,196.23	10,630.55
Interest Expense	16,698.75–	698.75–	21,611.20–
	$ 15,615.04–	$144,460.98	$ 991,793.42
Net Income Before Net Income of Subsidiary Company and Federal Income Tax	$ 79,360.49	$238,091.46	$2,023.352.85
Net Income of Subsidiary Company Getty Realty Corporation	$ 29,478.93	$ 24.726.72	$ 405,267.51
Net Income Before Federal Income Taxes	$108,839.42	$262,818.18	$2,428,620.36
Provision for Federal Income Taxes	1,150.00	850.00	50,000.00
Net Income for the Period	$107,689.42*	$261,968.18	$2,378,620.36
Earnings Per Share	$.08	$.19	$1.73

*Includes $265,000.00 provision for possible future dry-hole well costs Gordon Creek, Mott No. 3, McKittrick No. 73-30, Greer, Rankin and Tide Water leases.

EXHIBIT VI

Statement Showing Stock Market Quotations

	Mission		Skelly		Tide Water		Pacific Western		Sunray	
	High	Low	High	Low	High	Low	High	Low	High	Low
January 1946	34¾	30¾	61½	54	22¾	20⅛	31½	27½	9¼	8¼
February 1946	32½	29½	60	55¼	21½	18⅝	37¾	24½	9⅛	7⅝
March 1946	37¼	29⅛	72½	57	21¾	19⅜	31⅜	23¾	9⅛	7⅞
April 1946	43¼	36⅝	77½	71	24⅛	21¾	34⅝	29½	11	8⅞
May 1946	44	40¼	84½	76¾	23½	22	33	31	14	10⅝
June 1946	44	40¼	85½	78½	23¾	22⅛	32	29½	13⅜	11¼
July 1946	43	37	80½	69	23⅞	21½	29½	26	12¾	10½
August 1946	40½	33½	78½	67⅞	24⅛	20¾	28¾	25	11⅜	9¼
September 1946	34	28	67¼	58½	21¾	18⅛	24	20⅛	10	8⅛
October 1946	33	28	65	56	19¾	17¾	23½	19	9⅛	7⅜
November 1946	32	28	65¾	61¼	19⅞	17½	21⅞	18¼	9¼	7½
December 1946	35¾	29½	74½	66¼	20¼	18	22½	19¾	8⅞	7⅝
January 1947	34½	30¾	72½	67½	20¼	18¼	23	21¾	8⅝	7⅞
February 1947	33¾	32	70	68¼	19¾	18⅝	28⅝	22¾	9¾	8⅜
March 1947	34¼	28¾	71¾	65	19⅞	18¼	28½	25	10½	9
April 1947	36½	30½	72	67	20¼	18⅛	37⅝	27½	10⅛	8½
May 1947	35¾	32	73½	65¼	20⅝	18	33¾	30½	10⅜	8½
June 1947	37¼	33¾	73	68¼	20⅛	18¾	36½	31¾	10⅜	8⅞
July 1947	43¼	36½	86	71	22	20⅛	41¼	34	12⅛	10⅛
August 1947	41½	37⅝	84	78¼	21⅛	20	40½	35½	12	11⅛
September 1947	43¾	38¼	88¼	80	20⅞	19⅞	48¾	36⅞	12⅜	11
Averages	37.88	32.84	74.48	66.76	21.52	19.40	31.38	26.64	10.63	8.96
Average Middle Point	35.36		70.62		20.46		29.01		9.80	

Computation Showing Average Discount at Which Mission Stock Was Selling

Mission Shares Outstanding 1,374,145. No. Skelly Shares Owned by Mission 582,657. No. Tide Water Shares Owned by Mission 1,345,593. One Share of Mission equals .9792 Share of Tide Water plus .4240 Share of Skelly.

Tide Water	.9792 x $20.46	=	$20.03
Skelly	.4240 x $70.62	=	$29.94
			$49.97
Mission			$35.36
			$14.61 or 29 + % of $49.97

EXHIBIT VII

Statement of Continuity of Equity Interest Owned by Mission Stockholders

A		Shares of Mission Outstanding	1,374,145	100.000%
B		Owned by Pacific Western	641,808	46.706%
C	(A-B)	Owned by Continuing Mission Holders	732,337	53.294%
D		732,337 Shares of Mission to be exchanged on 6 to 1 basis for Sunray stock would result in Continuing Mission Holders receiving in lieu of Mission stock 4,394,022 Shares of Sunray.		
E		Present Sunray Shares Outstanding	4,923,646	52.84204%
F		New Sunray Shares to be Issued to Continuing Mission Holders	4,394,022	47.15796%
G		Resultant Outstanding Shares of Sunray	9,317,668	100.00000%
H		From the above it can be seen that the present shareholders in Mission (other than Pacific Western) own indirectly 53.294% of the net assets of Mission Corporation and following the merger will own indirectly 47.15796% of the net assets of Sunray.		

EXHIBIT VIII

Statement of Possible Dividends Which Mission Stockholders Might Expect in Event There Is No Merger

A—Calculation That Present Status Continues

B—Calculation That Skelly Might Pay $5.00 Dividend

	Calculation A	Calculation B
From Exhibit IV-A—Net income from oil operations for 9 months shows $109,-511.85, or at the rate of $12,167.98 per month x 12	$ 146,015.76	$ 146,015.76
From same Exhibit General and Administrative expense for 9 months shows $64,-249.90, or at the rate of $7,138.88 per month x 12	85,666.56	85,666.56
Net Operating Income	$ 60,349.20	$ 60,349.20
Dividends from 1,345,593 shares Tide Water @ $1.20	1,614,711.60	1,614,711.60
Dividends from 582,657 shares Skelly @ $2.50	1,456,642.50	
Dividends from 582,657 shares Skelly @ $5.00		2,913,285.00
Net Income Before Federal Income Taxes	$3,131,703.30	$4,588,345.80
Less Accrued Federal Income Taxes 6%	187,902.20	275,300.75
Available Net Income	$2,943,801.10	$4,313,045.05
1,374,145 Shares Outstanding		
Available Net Income Per Share	$2.14	$3.14
Reasonable Dividend Expectancy 1 Share	$2.00	$3.00

EXHIBIT IX

Statement of Possible Dividends Which Might Be Received From Six Shares of Sunray in the Event of the Merger and Sunray Continuing to Hold Tide Water Stock

A—Calculation That Present Status Continues

B—Calculation That Skelly Might Pay $5.00 Dividend

	Calculation A	Calculation B
Mission Net Operating Income (Exhibit VIII)	$ 60,349.20	$ 60,349.20
From Exhibit V-A, Pacific Western net income from operations for 9 months shows $1,031,559.43, or at the rate of $114,617.71 per month x 12	1,375,412.52	1,375,412.52
Net income of Getty Realty (Exhibit V-A) for 9 months shows $405,267.51, or at the rate of $45,029.72 per month x 12	540,356.64	540,356.64
Net profit of Sunray (Exhibit III-A) for 8 months shows $7,002,525.32, or rate of $875,315.66 per month x 12	10,503,787.92	10,503,787.92
Dividends from 1,345,593 shares Tide Water @ $1.20	1,614,711.60	1,614,711.60
Dividends from 577,854 shares Tide Water @ $1.20	693,424.80	693,424.80
Dividends from 582,657 shares Skelly @ $2.50	1,456,642.50	
Dividends from 582,657 shares Skelly @ $5.00		2,913,285.00
Net Income Before Additional Interest	$16,244,685.18	$17,701,327.68
(No Additional Federal Income Tax Deduction Deemed Necessary Due to Dividends Received Credits)		

Assume that in order to accomplish the merger, it will be necessary for Sunray to incur an additional indebtedness of $100,000,000 to provide for the payment to Pacific Western stockholders and for other merger costs and expenses—and that the interest rate of 4½% is applicable to the entire amount:		
4½% Interest on $100,000,000	4,500,000.00	4,500,000.00
Available Net Income	$11,744,685.18	$13,201,327.68
9,317,668 Shares to be Outstanding (Exhibit VII)		
Available Net Income Per Share	$1.26	$1.42
or for Six Shares	$7.56	$8.52
Reasonable Dividend Expectancy 50% of Net Earnings	$3.78	$4.26

EXHIBIT X

Statement of Possible Dividends Which Might Be Received From Six Shares of Sunray in Event of the Merger and All Tide Water Stock Sold by Sunray

A—Calculations that Present Status Continues

B—Calculations That Skelly Might Pay $5.00 Dividend

	Calculation A	Calculation B
Refer to Exhibit IX Showing Net Income before Additional Interest	$16,244,685.18	$17,701,327.68
On assumption that Tide Water stock is to be sold, reduce above figure by the dividend income from Tide Water, included therein	2,308,136.40	2,308,136.40
Net Income Before Additional Interest	$13,936,548.78	$15,392,191.28
Assume, as in Exhibit IX, that $100,000,000 additional funds required by Sunray, and that all Tide Water stock sold for $25 per share, or $48,086,175 cash, of which possibly $6,786,175 might be required for taxes arising from the sale, leaving $41,300,000 net to apply on the debt, reducing it to $58,700,000		
4½% Interest on $58,700,000	2,641,500.00	2,641,500.00
Available Net Income	$11,295,048.78	$12,750,691.28
9,317,668 Shares to be Outstanding (Exhibit VII)		
Available Net Income Per Share	$1.21	$1.37
or for Six Shares	$7.26	$8.22
Reasonable Dividend Expectancy 50% of Net Earnings	$3.63	$4.11

EXHIBIT XI

Statement Showing Evaluations of Continuing Mission Holders 53.294% in Mission's Net Assets—Using Various Evaluations for Skelly Stock

A—Using Skelly Stock at Market 10/18/47

Current Net Assets		$ 1,609,527	
Other Assets Net—Property, etc.		500,000	
1,345,593 T.W.A. @ $25		33,639,825	
		$ 35,749,352	
Dividend Declared by Skelly		728.321	
Dividend Declared by Mission	$1,030,608		
Additional Tax Liability	43,700	1,074,308	
Approximate Value of Mission Net Assets other than Skelly Stock—This figure to be used in all following computations		$ 35,403,365	
582,657 Shares Skelly @ $91		53,021,787	
Computed Net Value 1,374,145 Mission		$ 88,425,152	
53.29401% Thereof Applicable to Continuing Mission Holders of 732,337 Shares			$47,125,309
Value Per Share			$64.35
Market Value 10/18/47			$54.00
Selling at Discount of			16%

B—Using Skelly Stock at $125 Per Share

Evaluation Shown in A, above		$ 35,403,365	
582,657 Shares Skelly @ $125		72,832,125	
Computed Net Value 1,374,145 Mission		$108,235,490	
53.29401% Thereof			$57,683,033
Value Per Share			$78.77
Selling at Discount of			31%

C—Using Skelly Stock at $150 Per Share

Evaluation Shown in A, above	$ 35,403,365	
582,657 Shares Skelly @ $150	87,398,550	
Computed Net Value 1,374,145 Mission	$122,801,915	
53.29401% Thereof		$65,446,065
Value Per Share		$89.37
Selling at Discount of		40%

D—Using Skelly Stock at $175 Per Share

Evaluation Shown in A, above	$ 35,403,365	
582,657 Shares Skelly @ $175	101,964,975	
Computed Net Value 1,374,145 Mission	$137,368,340	
53.29401% Thereof		$73,209,097
Value Per Share		$99.97
Selling at Discount of		46%

EXHIBIT XII

Statement Showing Computations of Evaluations of Sunray Following the Merger—Assuming (A) Present Sunray Common to Be Worth Market Price of $11.50 Per Share (10/18/47), and (B) Tide Water to Be Worth $25 Per Share and Not Sold, and (C) Using Various Evaluations for Skelly Stock

A—Using Skelly Stock at Market 10/18/47

4,923,646 Sunray @ $11.50	$ 56,621,929	
1,923,447 T.W.A. @ $25	48,086,175	
Hotel Pierre	6,000,000	
Mission Net Current Assets and Properties	1,763,540	
Pacific—Net Current Assets and All Properties—Developed and Undeveloped	33,000,000	
	$145,471,644	
Less: New Debt Added	93,300,000	
Net New Value Added in Addition to Skelly Stock—This figure to be used in additional computations to follow	$ 52,171,644	
582,657 Shares Skelly @ $91	53,021,787	
Computed Net Value 9,317,668 Sunray Common	$105,193,431	
47.15796% Thereof		$49,607,076
Value Per Share		$11.29
Value of 6 Shares		$67.74

B—Using Skelly Stock at $125 Per Share

Evaluation Shown in A, above	$ 52,171,644	
582,657 Shares Skelly @ $125	72,832,125	
Computed Net Value 9,317,668 Sunray Common	$125,003,769	
47.15796% Thereof		$58,949,227
Value Per Share		$13.42
Value of 6 Shares		$80.52

C—Using Skelly Stock at $150 Per Share

Evaluation Shown in A, above	$ 52,171,644	
582,657 Shares Skelly @ $150	87,398,550	
Computed Net Value 9,317,668 Sunray Common	$139,570,194	
47.15796% Thereof		$65,818,456
Value Per Share		$14.98
Value of 6 Shares		$89.88

D—Using Skelly Stock at $175 Per Share

Evaluation Shown in A, above	$ 52,171,644	
582,657 Shares Skelly @ $175	101,964,975	
Computed Net Value 9,317,668 Sunray Common	$154,136,619	
47.15796% Thereof		$72,687,685
Value Per Share		$16.54
Value of 6 Shares		$99.24

EXHIBIT XIII

Statement Showing Changes in Converting Mission Stockholders' Indirect Equity Ownership in Skelly and Tide Water Stocks

A. Using $25 for T.W.A. and $91 for Skelly

Before Merger (1,374,145 - 641,808 = 732,337 = 53.294%)

1,345,593 T.W.A.	@ $25 = $33,639,825 × 53.294% =		$17,928,008
582,657 SYE	@ $91 = $53,021,787 × 53.294% =		28,257,961
			$46,185,969

After Merger (9,317,668 - 4,923,646 = 4,394,022 = 47.15796%)

1,923,447 T.W.A.	@ $25 = $48,086,175 × 47.15796% =		$22,676,459
582,657 SYE	@ $91 = $53,021,787 × 47.15796% =		25,003,993
			$47,680,452

Differences

After Merger Values	$47,680,452
Before Merger Values	46,185,969
Gain	$ 1,494,483

B. Using $25 for T.W.A. and $125 for Skelly

Before Merger (53.294% as A, above)

1,345,593 T.W.A. @ $25 (as A, above)		$17,928,008
582,657 SYE @ $125 = $72,832,125 × 53.294% =		38,815,881
		$56,743,889

After Merger (47.15796% as A, above)

1,923,447 T.W.A. @ $25 (as A, above)		$22,676,459
582,657 SYE @ $125 = $72,832,125 × 47.15796% =		34,346,144
		$57,022,603

Differences

After Merger Values	$57,022,603
Before Merger Values	56,743,889
Gain	$ 278,714

C. Using $25 for T.W.A. and $150 for Skelly

Before Merger (53.294% as A, above)

1,345,593 T.W.A. @ $25 (as A, above)	$17,928,008
582,657 SYE @ $150 = $87,398,550 × 53.294% =	46,579,057
	$64,507,065

After Merger (47.15796% as A, above)

1,923,447 T.W.A. @ $25 (as A, above)	$22,676,459
582,657 SYE @ $150 = $87,398,550 × 47.15796% =	41,215,373
	$63,891,832

Differences

Before Merger Values	$64,507,065
After Merger Values	63,891,832
Loss	$ 615,233

C. Alternate—Using $30 for T.W.A. and $150 for Skelly

(In Computations C Skelly stock is valued at more than 50% over its market. It would be equitable to increase values for Tide Water to at least $30, for equity comparisons in these computations.)

Before Merger (53.294% as A, above)

1,345,593 T.W.A. @ $30 = $40,367,790 × 53.294% =	$21,513,610
582,657 SYE @ $150 = $87,398,550 × 53.294% =	46,579,057
	$68,092,667

After Merger (47.15796% as A, above)

1,923,447 T.W.A. @ $30 = $57,703,410 × 47.15796% =	$27,211,751
582,657 SYE @ $150 = $87,398,550 × 47.15796% =	41,215,373
	$68,427,124

Differences

After Merger Values	$68,427,124
Before Merger Values	68,092,667
Gain	$ 334,457

D. Using $25 for T.W.A. and $175 for Skelly

Before Merger (53.294% as A, above)

1,345,593 T.W.A. @ $25 (as A, above)	$17,928,008
582,657 SYE @ $175 = $101,964,975 × 53.294% =	54,342,231
	$72,270,239

After Merger (47.15796% as A, above)

1,923,447 T.W.A. @ $25 (as A, above)	$22,676,459
582,657 SYE @ $175 = $101,964,975 × 47.15796% =	48,084,600
	$70,761,059

Differences

Before Merger Values	$72,270,239
After Merger Values	70,761,059
Loss	$ 1,509,180

D. Alternate—Using $35 for T.W.A. and $175 for Skelly

(In Computations D Skelly stock is valued at $84 per share more than its market value at 10/18/47, or 92% more. It should be equitable to increase values for Tide Water to at least $35 for equity comparisons in these computations. This is far less than the 92% increase of Skelly stock values over market.)

Before Merger (53.294% as A, above)

1,345,593 T.W.A. @ $35 = $47,095,755 × 53.294% =	$25,099,211
582,657 SYE @ $175 = $101,964,975 × 53.294% =	54,342,231
	$79,441,442

After Merger (47.15796% as A, above)

1,923,447 T.W.A. @ $35 = $67,320,645 × 47.15796% =	$31,748,147
582,657 SYE @ $175 = $101,964,975 × 47.15796% =	48,084,600
	$79,832,747

Differences

After Merger Values	$79,832,747
Before Merger Values	79,441,442
Gain	$ 391,305

E. Indirect Equity Ownership Changes

It would appear from the above computations that the Mission stockholders now owning 53.294% of the Mission stock have a certain indirect equity ownership in a certain number of shares of Skelly and Tide Water stock.

Following the proposed merger those same stockholders would have 47.15796% of the Sunray stock and would have a similar indirect equity ownership in the same number of shares of Skelly stock plus a similar indirect equity ownership in 1,923,447 shares of Tide Water stock.

When reduced to numbers of shares of Skelly and Tide Water involved in such indirect ownership, the following computations are significant:

Before Merger (the 732,337 shares of Mission, or 53.294%)

1,345,593 shares Tide Water × 53.294% = 717,120 shares
582,657 shares Skelly × 53.294% = 310,521 shares

717,120 shares by 732,337 shares is .97922 shares T.W.A. per share MSS

310,521 shares by 732,337 shares is .42401 shares SYE per share MSS

After Merger (the 4,394,022 shares of Sunray, or 47.15796%)

1,923,447 shares Tide Water × 47.15796% = 907,058 shares
582,657 shares Skelly × 47.15796% = 274,769 shares

907,058 shares by 732,337 shares is 1.23858 shares T.W.A. by present holder of 1 share MSS

274,769 shares by 732,337 shares is .37519 shares SYE by present holder of 1 share MSS

Differences

The Mission stockholders give up indirect equity ownership in 35752 shares of Skelly (310,521 less 274,769).

One share of Mission gives up indirect equity ownership in .04882 share of Skelly (.42401 less .37519).

The Mission stockholders gain indirect equity ownership in 189,938 shares of Tide Water (907,058 less 717,120).

One share Mission gains indirect equity ownership in .25936 share of Tide Water (1.23858 less .97922).

The following computations show various calculations of gains or losses in dollar values, due to changes in indirect ownership in Skelly and Tide Water stocks:

		Loss	Gain	Net Gain or Loss
35,752 shares SYE	@ $ 91	$3,253,432		
189,938 shares T.W.A.	@ $ 25		$ 4,748,450	
				$1,495,018
35,752 shares SYE	@ $125	4,469,000		
189,938 shares T.W.A.	@ $ 25		4,748,450	
				279,450
35,752 shares SYE	@ $150	5,362,800		
189,938 shares T.W.A.	@ $ 25		4,748,450	
				614,350–
35,752 shares SYE	@ $175	6,256,000		
189,938 shares T.W.A.	@ $ 25		4,748,450	
				1,508,150–
Alternates				
35,752 shares SYE	@ $150	5,362,800		
189,938 shares T.W.A.	@ $ 30		5,698,140	
				335,340
35,752 shares SYE	@ $175	6,256,600		
189,938 shares T.W.A.	@ $ 35		6,647,830	
				391,230
		$30,961,232	$31,339,770	$ 378,538
Average of above 6 computations		$ 5,160,250	$ 5,223,295	$ 63,090

To reduce the above computed averages for the entire 732,337 shares of Mission to a per share average effect, the amount would be $.086 per share.

Analyzing all of the above computations with reference to continuing values, which computations are, if anything, conservative against Mission equity interests due to using arbitrary values of $125, $150 and $175 for Skelly stock in 5 of the computations, and using a decreased arbitrary value of $30 and $35 for Tide Water stock in only 2 of the computations, the resulting conclusion is that Mission shareholders continuing indirect ownership would increase about eight and six-tenths cents per share as a result of the merger. [431]

Upon the conclusion that Mission stockholders' indirect equity ownership in values represented by Tide Water and Skelly stock would therefore not be affected as a result of the merger, the next necessary fact to ascertain is that the indirect assumption by such Mission stockholders of 47.15796% of the newly created debt of $93,300,000 (or $43,998,377) is more than offset by the acquisition of indirect equity ownership of other assets held prior to the merger by Pacific Western, Mission and Sunray.

EXHIBIT XIV

Statement Showing Acquisitions of Equity Interests by Continuing Mission Stockholders of Net Assets Other Than Tide Water and Skelly Stocks (Those Computations Having Been Shown in Exhibit VIII)

Three calculations are herein made as follows:

A—Showing Book Figures Only

B—Using Market Value of Sunray and Evaluation Statements for Mission and Pacific Western

C—Using Evaluation Statement

		Calculation A	Calculation B	Calculation C
Mission				
Current Assets (Exhibit IV)	$1,760,847			
Less Current Liabilities	151,320	$ 1,609,527	$ 1,609,527	$ 1,609,527
Fixed Assets				
Per Exhibit IV		117,439		
Per Exhibit XVII			500,000	500,000
Net Mission		$ 1,726,966	$ 2,109,527	$ 2,109,527
Pacific Western				
Assets—Other (Exhibit V)	$5,576,569			
Less Liabilities	1,571,297	$ 4,005,272	$ 4,005,272	$ 4,005,272
Fixed Assets				
Per Exhibit V		13,402,488		
Per Exhibit XVIII			36,000,000	36,000,000
Net Pacific Western		$17,407,760	$40,005,272	$40,005,272
Sunray				
Net Value (Exhibit III)	$ 4,689,186			
	30,676,088	$35,365,274		
Market Value $11.50 × 4,923,646 Shares			$56,621,929	
Evaluation (Exhibit XV)				$104,625,043
Net Sunray		$35,365,274	$56,621,929	$104,625,043
Total Combined		$54,500,000	$98,736,728	$146,739,842
Less Assumed New Debt		100,000,000	100,000,000	100,000,000
Net		$45,500,000–	$ 1,263,272–	$46,739,842

Obviously in Calculations A book figures mean nothing with reference to actual values. Calculations B show net value of Sunray at $56,621,929, which is also understated by using market value of its stock, which undoubtedly is lower than actual value, but such computation, however, has been used with Calculations C to arrive at an average of the two in order to ascertain that the net asset values being acquired offset the debt being assumed.

Net Calculations B	$ 1,263,272–
Net Calculations C	46,739,842
Total B and C	$45,476,570
Average of B and C (Net gain for 9,317,668 shares)	$22,738,285
Net gain applicable to Continuing Mission Shareholders' 47.15796% of Sunray	$10,722,911
Amount applicable, per share, to present 732,337 shares Mission	$1.46

EXHIBIT XV

Evaluation of Sunray Common Stock at 8/31/47

Current Assets—Per Books		$ 16,762,373
Oil and Gas Reserves (Exhibit EV-SUY-II)		122,190,154
Non-Producing Properties—Per Books		5,773,893
Refineries Evaluation (Exhibit EV-SUY-I)		20,000,000
Drilling Tools, Autos, Trucks and General Equipment—Per Books		1,698,539
Work in Progress—Per Books		2,692,138
		$166,117,097
Less:		
Current Liabilities—Per Books	$ 5,645,357	
Long Term Debt—Per Books	29,119,667	
Provision for Federal Tax—Per Books	537,670	
Preferred Stock—Per Books	26,189,360	
		61,492,054
Net Evaluation 4,923,646 Shares of Common or $21.25 Per Share		$104,625,043

EXHIBIT XV-A

Sunray Oil and Gas Reserves Evaluation

I obtained and analyzed a detailed report of all of the productive properties of Sunray. This report was prepared by Harold J. Wasson as of 3/31/46. With this information at hand I discussed with a representative of De Golyer and MacNaughton the reserves shown therein, and the probability of their being substantially correct and supportable, and as to any probable substantial change in the amounts involved between the dates of 3/31/46 and 8/1/47, other than depletion due to production.

The total Developed Proved Reserves estimated to be recoverable from wells already drilled was	123,262,519 bbls.
The total Proved but Undrilled Reserves was estimated at	72,881,172 bbls.
	196,143,691 bbls.
The total estimated Reserves of Gas was	594,295,000 m.c.f.

I ascertain from statements of Sunray that the monthly net production was slightly in excess of 1,000,000 barrels. I reviewed a current estimate of net oil reserves which indicated a tentative net of 185,000,000 barrels. In order to arrive at which I considered to be a conservative basis for estimating for my purposes the reserves of Sunray, I took an arbitrary 20% discount of the computed reserves of 3/31/46, with the results as follows:

Proved and Drilled Reserves	123,262,519 bbls.
Less 20%	24,652,504 bbls.
Present Proved and Drilled Reserves	98,610,015 bbls.

Proved but Not Drilled Reserves.....	72,881,172 bbls.
Less 20%	14,576,234 bbls.
Present Proved but Not Drilled Reserves	58,304,938 bbls.

The sum of such present reserves so computed was 156,914,953 barrels, which was 28,085,047 barrels less than the current appraisal of 185,000,000 above referred to, and 20,585,047 barrels less than the final adjusted current appraisal of 177,500,000 barrels.

In order to evaluate such computed reserves I used several yardsticks of value as follows:

A.	98,610,015 bbls. drilled reserves	@ $.75 total	$ 73,957,511
	58,304,938 bbls. proved undrilled	@ $.50 total	29,152,469
	594,295,000 m.c.f. gas	@ $.02 total	11,885,900
			$114,995,880
B.	156,914,953 bbls. reserves	@ $.70	$109,840,467
	594,295,000 m.c.f. gas	@ $.02	11,885,900
			$121,726,367
C.	34,000 bbls. daily production	@ $2500	$ 85,000,000
	58,304,938 bbls. undrilled	@ $ .50	29,152,469
	594,295,000 m.c.f. gas	@ $ .02	11,885,900
			$126,038,369

D.	Annual Computed Profit from Oil and Gas Production, exclusive of Depreciation and Depletion—i.e., cash income	$ 18,000,000
	Multiplied by 7 years	$126,000,000

Following these computations I computed an average evaluation as follows:

A.	$114,995,880
B.	121,726,367
C.	126,038,369
D.	126,000,000
	$488,760,616

Divided by 4 for average $122,190,154, which was my evaluation of Sunray's Oil Reserves.

EXHIBIT XV-C

Sunray Refinery Evaluation

An analysis of the reports of the refinery operations for the years 1942, 1943, 1944 and 1945 was made. The net profits realized through refinery operations, although substantial, were not indicative to me as a basis upon which to evaluate the refineries at the present time, as price restrictions upon products were in effect during such years.

I reviewed and analyzed the detailed refinery operating statements for the month of August, 1947, and for the eight months to August 31, 1947. Under improved market prices being obtained for products, these statements seemed to be a more reasonable basis upon which to evaluate the refineries.

The August, 1947, statement for the Allen Refinery showed a total of 404,690 barrels of crude processed and a net profit of $318,673 therefrom, or a rate of 78c per barrel. The Santa Maria refinery showed a profit of $11,063 for the month of August, 1947. These figures were after all charges for depreciation, etc. The production of

crude oil by Sunray was far in excess of its refinery requirements and I concluded that a continuing source of crude supply for the refineries was not a problem.

On a conservative basis, I determined that the refinery operations of Sunray, exclusive of any consideration for additional refinery profits, arising from the future operations of the newly acquired refinery at Beckett, should result in profits of $275,000 per month, or $3,300,000 per year.

This profit I evaluated at $20,000,000 (approximately 6 years), and used such evaluation in my analysis of the evaluation of Sunray. [437]

EXHIBIT XVI-A

Evaluation of Skelly Common Stock
at 6/30/47

Current Assets	$ 31,108,650	
Oil-Gas Reserves (Exhibit EV-SYE-II)	178,805,000	
Refineries, Skelgas and Gasoline Plants (Exhibit EV-SYE-I)	32,463,000	
Undeveloped Oil and Gas Properties	10,275,633	
Bulk and Service Stations, Lube Plant, Pipe Line Systems, Investments and Long-Term Receivables, Other Fixed Assets Per Book Figures (Exhibit EV-SYE-I)	10,380,864	
		$263,033,147
Less:		
Current Liabilities	$ 13,905,833	
Funded Debt	16,000,000	
Reserves	1,992,832	
		31,898,665
Net evaluation of 981,348.6 Shares		$231,134,482
or $235.53 Per Share		

EXHIBIT XVI-B

Skelly Oil Company
Oil and Gas Reserves Evaluation

From information obtained from various sources, including an appraisal of some time ago by DeGolyer and MacNaughton as to reserves, I determined to use the following reserve figures in evaluating Skelly reserves:

Proved and Drilled Reserves	150,000,000 bbls.
Proved but Not Drilled	60,000,000 bbls.
Total	210,000,000 bbls.
Gas Reserves	1,600,000,000 m.c.f.

Evaluated by several yardsticks as follows:

A.	150,000,000 bbls. drilled Reserves	@ $.75	$112,500,000
	60,000,000 bbls. proved undrilled	@ $.50	30,000,000
	1,600,000,000 m.c.f. Gas	@ $.02	32,000,000
			$174,500,000
B.	210,000,000 bbls. Reserves	@ $.70	$147,000,000
	1,600,000,000 m.c.f. Gas	@ $.02	32,000,000
			$179,000,000
C.	50,000 bbls daily	@ $2500	$125,000,000
	60,000,000 bbls. undrilled	@ $ .50	30,000,000
	1,600,000,000 m.c.f. Gas	@ $ .02	32,000,000
			$187,000,000

D. Annual Computed Profit from Oil and Gas Production, exclusive of Depreciation and Depletion—i.e., cash income

6 Months to 6/30/47	$ 9,496,767	
Add Depletion & Depreciation	2,983,360	
One-half Year	$12,480,127	
One Year	$24,960,254	
Multiplied by 7 Years		$174,722,000

Following these computations I computed an average evaluation:

A.	$174,500,000
B.	179,000,000
C.	187,000,000
D.	174,722,000
	$715,222,000

Divided by 4 for average $178,805,000, which was my evaluation of Skelly Reserves.

EXHIBIT XVI-C

Skelly Oil Company 6/30/47
Evaluations

Refineries and Gasoline Plants		
Natural Gasoline Plants All		
Profits 6 Months to 6/30/47	$ 716,790	
Annual Rate	$1,433,500	
Times 6 years		$ 8,601,000
Skelgas Division		
Profits 6 Months to 6/30/47	$ 718,111	
Annual Rate	$1,436,222	
Times 6 years		8,617,000
Refineries and Perry Petroleum		
Profits 6 Months to 6/30/47	$1,177,837	
	92,607	
	$1,270,444	
Annual Rate	$2,540,888	
Times 6 years		15,245,000
		$32,463,000
Other Assets		
At Depreciated Book Values		
Lube Plant		$ 186,103
Bulk and Service Stations		4,684,110
Crude and Pipe Line Systems		2,283,418
Undeveloped Oil and Gas Properties (1,915,916 Acres)		10,275,633
		$17,429,264
Investments and Long-Term Receivables		656,992
Other Fixed Assets		2,570,241
		$20,656,497
Current Net Assets, etc.		
Current Net Assets		$31,108,650
Current Liabilities	$13,905,833	
Funded Debt	16,000,000	
Reserves	1,992,832	31,898,665
		$ 790,015–

EXHIBIT XVII

Evaluation of Mission 10/18/47
Based Upon Evaluation of Skelly

Current Assets 9/30/47 Balance Sheet		$ 1,760,847
Dividend to be received from Skelly		728,321
Other Assets—Lease, Royalties and Property		500,000
Subtotal		$ 2,989,168
Less:		
Current Liabilities 9/30/47	$ 151,320	
Additional Tax to Accrue	43,700	
Dividend Declared	1,030,608	1,225,628
Net Assets Other Than Stocks		$ 1,763,540
1,345,593 Shares Tide Water @ $25		33,639,825
582,657 Shares Skelly @ $235.53		137,233,203
Computed Evaluation of 1,374,145 Shares or $125.63 Per Share		$172,636,568

EXHIBIT XVIII

Pacific Western Evaluation
Based Upon Mission Evaluation

Current Assets	$5,182,425	
Additional Mission Dividend	481,000	
	$5,663,425	
Less Current Liabilities	1,528,779	
Net Current Assets		$ 4,134,646
Hotel Pierre		6,000,000
577,854 Shares Tide Water @ $25		14,446,350
641,808 Shares Mission @ $125.63		80,630,339
All Oil Reserves, Developed and Undeveloped, Fee Properties, Autos, Trucks, Tank Farms, All Other Equipment, and Undeveloped Lands and Leases		30,000,000
Computed Evaluation of 1,371,730 Shares or $98.57 Per Share		$135,211,335

Pacific Western Stockholders to receive for such Shares $68.00 or 68.00/98.57s of Computed Valuation, or 68.9865% thereof.

In the District Court of the United States of America, in and for the District of Nevada

Civil No. 669

WILLIAM G. SKELLY,

Plaintiff,

vs.

MISSION CORPORATION, a Corporation,

Defendant.

ORDER AND FINDINGS ON APPLICATION FOR PRELIMINARY INJUNCTION

After the filing of the Complaint and on the same day, November 4, 1947, the Court made its order fixing November 21, 1947, as the time for hearing plaintiff's application for temporary injunction. On November 18, 1947, plaintiff filed an Amended Complaint; defendant's Answer to said Amended Complaint was filed November 20, 1947. By stipulation defendant's Motion to Dismiss the action is to be considered as directed to the Amended Complaint. Before the hearing of the application for temporary injunction, several petitions to intervene in the action were filed. John H. Blaffer, claiming to be the owner of 1500 shares of defendant Mission Corporation, asked to intervene against the defendant. Several petitions to intervene in support of defendant's contentions were also filed. The motions to intervene having been filed on or near the day set for the hearing of the application for temporary injunction, [693] the Court has determined to postpone consideration of said motions.

On November 21, 1947, the application for temporary injunction came on regularly to be heard and was submitted upon the pleadings, depositions and affidavits offered in behalf of plaintiff and defendant. Arguments were presented on behalf of the parties and also by attorneys representing those seeking to intervene.

The Motion to Dismiss is denied.

From the pleadings, affidavits and depositions considered upon the hearing of the application for temporary injunction, the Court makes the following findings of fact:

FINDINGS OF FACT

1. That plaintiff William G. Skelly is a citizen and resident of the State of Oklahoma; that defendant Mission Corporation is a corporation organized and existing under and by virtue of the laws of the State of Nevada; that the matter in controversy herein exceeds exclusive of interest and costs the sum or value of $3,000.00. That plaintiff is the beneficial owner and holder of 14,000 shares of the common capital stock of defendant of which 2,000 are of record in his name on the books of the corporation and 12,000 shares are beneficially owned by him.

2. That Thomas A. J. Dockweiler and George Franklin Getty II are trustees under that certain declaration of trust dated December 31, 1934, wherein Sarah C. Getty is named as trustor and J. Paul Getty as original trustee; J. Paul Getty

is testamentary trustee under the decree of partial distribution of the estate of Sarah C. Getty, deceased. Said trustees and J. Paul Getty, individually, are hereinafter referred to as the "Getty Interests." [694]

3. That the Getty Interests are and at the times alleged in the Amended Complaint have been the owners of 1,169,449 shares of the common capital stock of Pacific Western Oil Corporation, a Delaware Corporation (hereinafter called "Pacific"), out of a total issued and outstanding of 1,371,730; that in the annual meetings of the defendant, Pacific voted its stock for the election of the directors of the defendant; that the Getty Interests have and exercise actual control of Pacific.

4. That Pacific is the owner and holder of record of 641,808 shares of common capital stock of the defendant Mission Corporation (hereinafter called "Mission"), out of a total issued and outstanding of 1,374,145; that the remaining shares of stock of Mission are owned by approximately 29,300 different stockholders, said stockholders being hereinafter referred to as "Remaining Stockholders."

5. That the Getty Interests, some time prior to October 4, 1947, decided to obtain cash for their stock in Pacific; that Getty Interests entered into a written agreement under date of October 4, 1947, a copy of which is "Exhibit A" annexed to the Amended Complaint; that on October 4, 1947, the market price of Pacific common stock on the New York Stock Exchange was $52.00 per share and that its book value on September 30, 1947, was

$22.80 per share; that by the terms of said agreement "Exhibit A" Sunray Oil Corporation (hereinafter called "Sunray"), is to pay Getty Interests immediately prior to the merger described in "Exhibit A" becoming effective, $68.00 per share for Getty Interests' Pacific, or a total of $79,522,532.00; that the book value on said date was approximately $26,663,437.20 and its market value was $60,811,-348.00; that "Exhibit A" provides that said sale is [695] to be made and the purchase money paid immediately prior to the said merger.

6. That the agreement to merge Pacific and Mission into Sunray, "Exhibit B" attached to the Amended Complaint, was prepared by Sunray and Eastman, Dillon & Company, and the Getty Interests; that said agreement of merger, "Exhibit B," is conditioned on Sunray becoming the owner of the shares of capital stock of Pacific now owned by Getty Interests, prior to or simultaneously with the effective date of the merger.

7. That on October 18, 1947, at a special meeting, defendant's Board of Directors by a purported majority (Directors Skelly and Hyden voting "No"), approved said merger agreement, "Exhibit B," and ordered the calling of a special meeting of defendant's stockholders to be held on the 6th day of December, 1947, at 10:00 o'clock a.m. at the principal office of defendant, 153 N. Virginia Street, Reno, Nevada, to consider and vote upon the adoption of said merger agreement, "Exhibit B"; that it is the intention of said Getty Interests at said stockholders' meeting of December 6, 1947, through their control of Pacific, the dominant stockholder of

Mission, to cause said merger agreement to be approved and adopted; that said Pacific is the dominant stockholder of Mission and is in control of said defendant.

8. That defendant owns 1,345,593 shares of the capital stock of Tide Water Associated Oil Company; that on the effective date of the agreement of merger said stock is to be sold by Sunray to Tide Water Associated Oil Company at the price of $25.00 per share, or a total price of $33,639,825.00; that said Tide Water Associated Oil Company stock owned by defendant corporation was at the date of this action of the [696] market value of the sum of $31,453,236.17; that said sale will also include 577,854 shares of Tide Water stock owned by Pacific; that the proceeds of said sale are to be applied on payment for Pacific to be purchased as aforesaid.

9. That at the meeting of the Board of Directors of the defendant on October 18, 1947, and prior to a consideration by said Board of the proposed merger agreement, plaintiff was removed as president of defendant and David T. Staples was elected in his stead; that it was suggested to Director Hyden that he resign as a director of defendant because he had indicated that he would not vote for the proposed merger; this suggestion was made by one of the directors who voted in favor of the proposed merger; that Mr. Hyden did not resign as suggested; that prior to the meeting of October 18, 1947, B. I. Graves resigned as a director of defendant and at said meeting David T. Staples was elected to succeed him.

10. That the action of defendant's Board of Directors on October 18, 1947, was effected and done by the vote of defendant's directors, David T. Staples, Fero Williams, Emil Kluth and Arthur M. Boal; that said Staples is president of defendant and the president and director of Pacific; that Fero Williams is a director and assistant secretary and assistant treasurer of Pacific; that Emil Kluth is vice-president of Pacific; that all of the above named directors of Pacific were elected directors of Pacific by the Getty Interests; that at the stockholders' meeting for election of directors of Mission held May 8, 1947, the stock of Mission owned by Pacific was voted for the following named directors who were elected: Arthur M. Boal, Thomas A. J. Dockweiler, B. I. Graves, Arch H. Hyden, Emil Kluth, W. G. Skelly and Fero Williams.

That under date of December 21, 1946, Pacific offered to certain of its employees options to purchase between January 15 and February 1, 1948, an aggregate of 4,477 shares of its capital stock held in its treasury at the price of $20.00 per share, provided, that each employee who might desire to take advantage of the offer should authorize 24 semi-monthly payroll deductions sufficient to pay for his stock to be applied to payment therefor if such stockholder should elect to exercise such option. Pursuant to such offer, D. T. Staples, Emil Kluth and Fero Williams indicated to Pacific that they might desire to purchase 150 shares, 100 shares and 93 shares, respectively, of said capital stock,

and each of them authorized the required payroll deductions in connection therewith; and that Staples, Kluth and Williams, if the merger becomes effective, are to be permitted to pay up the said purchase price, $20.00 per share, and the shares so purchased will be paid for in cash if they elect to take cash for them at the same rate at which the shares of the Getty Interests will be paid for, $68.00 per share.

That David T. Staples, president and director of both Pacific and Mission, Emil Kluth, the vice-president of Pacific and a director of Mission, Fero Williams, treasurer and a director of Pacific and a director of Mission, are expected to be associated with Sunray as employees at substantially their present salaries; Mr. Staples' present aggregate salary from Pacific is $27,500.00; the salary of none of the others is in excess of $15,000.00.

That Thomas A. J. Dockweiler, director of Mission and also one of the trustees under a declaration of trust wherein Sarah C. Getty was trustor dated December 31, 1934, before he signed the agreement of October 4, 1947, had a conference with Mr. Clarence Wright, president of Sunray, in which he insisted that [698] if the trustees and Mr. J. Paul Getty were to enter into any agreement to sell to Sunray, the heads of their departments and their top men in Pacific would have to be taken care of and taken over by the new company without detriment to them; that Mr. Wright so agreed.

11. That prior to October 18, 1947, there had not been presented to defendant's Board of Directors

any matters pertaining to the merger of the corporations, parties to "Exhibit B," nor had any negotiations concerning such proposed merger been conducted with said W. G. Skelly, defendant's then president; that at the meeting of October 18, 1947, there was presented to defendant's Board said "Exhibit B"; that the Board of Directors acting by and through the directors representing the Getty Interests did not have and refused to procure an appraisal value of the assets of the corporations proposed to be merged; that said merger agreement was submitted to the attorney for defendant on October 17, 1947, and that his opinion was submitted orally at the meeting of directors October 18, 1947, to the effect that said proposed merger was in all respects legal; that the attorney submitting said opinion was Arthur M. Boal, a director of defendant elected by the Getty Interests; that the said directors refused to delay the consideration of the merger agreement for 48 hours to give counsel for the defendant further time to study and consider said merger agreement; that at said meeting of October 18, 1947, the two resolutions, "Exhibit C" and "D" attached to the Amended Complaint, were proposed by W. G. Skelly, seconded by Director Arch Hyden and rejected by a majority of the Board of Directors, said directors constituting said majority having been elected directors of defendant by the Getty Interest through their ownership of Pacific, the dominant stockholder of Mission.

12. That under the proposed merger agreement the plan of [699] converting the shares of the constituent corporations among other things provides that the Pacific stockholders other than the Getty Interests have the alternative of taking $68.00 in cash or 7/10 of one share of 1947 prior preferred stock of Sunray for each share of Pacific; that under said plan of conversion each share of stock of Mission which shall be outstanding on the effective date of the agreement of merger (except shares held in the treasury of Mission or owned by any other constituent corporation) shall be converted into 6 shares of the common stock of Sunray; that if the Mission stockholders other than Pacific accept the common stock of Sunray, their interest in Sunray will be subject to debts and senior securities and other obligations in large sums, some of which are the following: Current liabilities, $21,000,000.00; debentures or notes, $56,825,000.00 excluding approximately $4,000,000.00 included in current liabilities; prior preferred stock, $26,189,300.00; second preferred stock, $25,000,000.00; other liabilities not including common stock, $2,785,967.46 excluding $129,866.80 including current liabilities.

13. That if the Remaining Stockholders of Mission elect to convert their new Sunray stock into cash they would take the risk of fluctuations in the market price and of receiving considerably less than the apparent value of the shares of the surviving corporation at current market prices; that the Getty Interests have secured themselves against any such risks of losses and costs by arranging in

advance to receive an amount certain on a particular date without any expense of liquidation or risk of diminution of the value fixed by them for their investment.

On the basis of the foregoing, the Court makes the following conclusions of law:

CONCLUSIONS OF LAW

1. That the ratios of exchange for Pacific stock and the [700] stock of the Remaining Stockholders of Mission provided for in the proposed merger agreement, said "Exhibit B" attached to the Amended Complaint, are unequal and were arrived at without an appraisal of the constituent companies by an independent appraiser.

2. That Fero Williams, Emil Kluth and David T. Staples, directors of Mission Corporation October 18, 1947, each had a financial interest in the merger agreement, "Exhibit B" attached to the Amended Complaint, at the times they acted upon the same.

3. That by reason of said interest of said named directors, the directors' meeting of Mission Corporation on October 18, 1947, and the resolution adopted at such meeting approving said agreement of merger were nullities; and the action of said directors in entering into and signing said agreement of merger on October 18, 1947, is not an approval and signing of said agreement by a legal majority of a Board of Directors of the defendant Mission Corporation.

4. That the above named three directors were influenced and controlled by Director Thomas A. J. Dockweiler and that the principal interest and purpose of said Dockweiler on October 18, 1947, and at all times throughout the negotiation for said proposed merger was to bring about the sale of stock of Pacific Western Oil Corporation owned by the Getty Interests for $68.00 per share.

ORDER

It appearing to the Court that the issuance of a preliminary injunction is necessary to prevent immediate and irreparable damage for the reasons set forth in the above Findings of Fact and Conclusions of Law,

It Is Ordered, Adjudged and Decreed That a preliminary [701] injunction be, and it hereby is, granted plaintiff William G. Skelly against the said defendant Mission Corporation, a corporation, its officers, directors, agents, servants, employees, and attorneys and upon those persons in active concert or participation with it or them, restraining it and them from proceeding further with the said proposed merger considered by its Board of Directors on October 18, 1947, and

It Is Further Ordered, Adjudged and Decreed that said defendant Mission Corporation, a corporation, its officers, directors, agents, servants, employees, and attorneys and those persons in active concert or participation with it or them be, and they hereby are, enjoined and restrained from hold-

ing on December 6, 1947, or at any other time, a stockholders' meeting to consider and vote upon the said agreement of merger considered and acted upon by the defendant's Board of Directors on October 18, 1947, or from proceeding further with said proposed merger.

It Is Further Ordered that plaintiff forthwith give a penal bond in the sum of $5,000.00 conditioned for the payment of such costs and damages as may be incurred or suffered by any party who shall be found to have been wrongfully enjoined or restrained and that said preliminary injunction remain in full force and effect until final hearing in this court or until further order of this Court.

Dated: This 2nd day of December, 1947.

ROGER T. FOLEY,
United States District Judge.

[Endorsed]: Filed Dec. 3, 1947. [702]

[Title of District Court and Cause.]

BOND FOR TEMPORARY INJUNCTION

Whereas, by an Order of the above entitled Court, made on the 3rd day of December, 1947, plaintiff was required to file an undertaking in the sum of Five Thousand Dollars ($5,000) in this action, wherein was granted a temporary injunction restraining and enjoining the above named defend-

ant from the commission of certain acts as the same are more particularly set forth and described in the order and opinion of the Court.

Now, Therefore, we, William G. Skelly, as principal, and Hartford Accident and Indemnity Company, a corporation duly qualified to do business in the State of Nevada, as surety, in consideration of the premises and of the issuing of said temporary injunction, do jointly undertake in the sum of Five Thousand Dollars ($5000) that said plaintiff, William G. Skelly will pay to the party enjoined such damages not exceeding the sum of Five Thousand Dollars ($5,000) as may be incurred or suffered [705] by any party who shall be found to have been wrongfully enjoined or restrained if the Court finally decides that the plaintiff was not entitled thereto.

In Witness Whereof, the principal and surety hereto have executed these presents this 3rd day of December, 1947.

/s/ WILLIAM G. SKELLY,
Principal.

HARTFORD ACCIDENT AND INDEMNITY COMPANY,
Surety.

By J. E. SLINGERLAND,
Its Attorney-in-Fact.

Approved:

/s/ ROGER T. FOLEY,
United States District Judge.

State of Nevada,
County of Washoe—ss.

On this 3rd day of December, 1947, personally appeared before me, a notary public in and for the county aforesaid, William G. Skelly, known to me to be the person described in and who executed the foregoing instrument, who acknowledged to me that he executed the same freely and voluntarily and for the uses and purposes therein mentioned.

In Witness Whereof, I have hereunto set my hand and affixed my Notarial Seal the day and year in this certificate first above written.

[Seal] CATHERINE TWEEDT,
Notary Public.

My Commission expires September 24, 1951.

State of Nevada,
County of Washoe—ss.

On this 3rd day of December, 1947, personally appeared before me, a Notary Public in and for the county aforesaid, J. E. Slingerland, known to me to be the person whose name is subscribed to the within instrument as the attorney-in-fact of Hartford Accident and Indemnity Company and acknowledged that he subscribed the name of said Hartford Accident and Indemnity Company thereto as Surety, and his own name as attorney-in-fact freely and voluntarily for the uses and purposes

therein mentioned; that said J. E. Slingerland is known to me to be the attorney-in-fact duly authorized to execute the same on behalf of said Hartford Accident and Indemnity Company, a corporation, and said J. E. Slingerland upon oath did depose that he is the attorney-in-fact for said corporation as above designated; that he is acquainted with the seal of said corporation and that the seal affixed to said instrument is the corporate seal of said corporation; and that the said corporation executed the said instrument freely and voluntarily and for the uses and purposes therein mentioned.

In Witness Whereof, I have hereunto set my hand and affixed my official seal at my office in the county aforesaid, the day and year in this certificate first above written.

[Seal] CATHERINE TWEEDT,
Notary Public.

My Commission expires September 24, 1951.

[Endorsed]: Filed Dec. 4, 1947. [707]

[Title of District Court and Cause.]

MOTION FOR SUPERSEDEAS

Defendant moves the Court to stay the enforcement of the judgment and order entered and filed in the above entitled action on the 3rd day of December, 1947, granting a preliminary injunction to the plaintiff, pending the disposition of defendant's appeal to the United States Circuit Court of Appeals for the Ninth Circuit, and for that purpose to fix the amount of the bond required to be filed by defendant.

L. D. SUMMERFIELD,
First National Bank Building
(Branch) Reno, Nevada.

HAWKINS, RHODES &
HAWKINS,
Stack Building, Reno, Nevada

By ROBERT ZIEMER HAWKINS,
BRYCE RHODES,
Attorneys for Defendant.

Notice of the foregoing Motion is hereby waived and it is stipulated that the same may be considered and acted upon by the Court forthwith.

December 4, 1947.

JOHN P. THATCHER,
Of Counsel for Plaintiff.

[Endorsed]: Filed Dec. 4, 1947. [708]

[Title of District Court and Cause.]

ORDER DENYING MOTION FOR SUPERSEDEAS

Defendant's Motion for Supersedeas having come on regularly to be heard before this Court on the 4th day of December, 1947, at 4:30 o'clock p.m., and the Court being fully advised, It Is Ordered that said Motion for Supersedeas be, and the same hereby is denied.

Dated this 4th day of December, 1947.

ROGER T. FOLEY,
United States District Judge.

[Endorsed]: Filed Dec. 4, 1947. [709]

[Title of District Court and Cause.]

NOTICE OF APPEAL TO CIRCUIT COURT OF APPEALS

Notice Is Hereby Given that Mission Corporation, a corporation, defendant above named, appeals to the Circuit Court of Appeals for the Ninth Circuit from the judgment and order entered in this action on the 3rd day of December, 1947, granting a preliminary injunction to the plaintiff above named against the above named defendant.

Dated this 4th day of December, 1947.

L. D. SUMMERFIELD,
First National Bank Building
(Branch), Reno, Nevada.

HAWKINS, RHODES &
HAWKINS,
Stack Building, Reno, Nevada.

By ROBERT ZIEMER HAWKINS,
BRYCE RHODES,
Attorneys for Defendant.

[Endorsed]: Filed Dec. 4, 1947. [710]

[Title of District Court and Cause.]

BOND FOR COSTS ON APPEAL

Know All Men by These Presents, That we, Mission Corporation, as principal, and American Surety Company of New York, as sureties, are held and firmly bound unto William G. Skelly, plaintiff in the above-entitled action, in the full and just sum of Two Hundred and Fifty ($250) Dollars, to be paid to the said William G. Skelly, his successors, executors, administrators and assigns; to which payment well and truly to be made, we bind ourselves, our heirs, executors, administrators, successors and assigns, jointly and severally by these presents.

Sealed with our seals and dated this 4th day of December, 1947.

Whereas, on the 3rd day of December, 1947, in an action depending in the United States District Court, in and for the District of Nevada, between William G. Skelly, as plaintiff, and Mission Corporation, a corporation, as defendant, [711] a Judgment and Order were rendered against the said Mission Corporation and the said Mission Corporation having filed a Notice of Appeal from such Judgment and Order to the United States Circuit Court of Appeals, for the Ninth Circuit;

Now, the condition of this obligation is such, that if the said Mission Corporation shall prosecute its appeal to effect and shall pay costs if the appeal is dismissed or the judgment affirmed, or such costs as the said Circuit Court of Appeals may award

against the said Mission Corporation if the Judgment is modified or in any other event, then this obligation to be void; otherwise, to remain in full force and effect.

MISSION CORPORATION,
a Corporation.

[Seal] By /s/ ROBERT Z. HAWKINS,
Secretary-Treasurer,
Principal.

AMERICAN SURETY
COMPANY OF NEW YORK,

[Seal] By /s/ HOWARD PARISH,
Attorney in Fact,
Surety.

The above bond is approved.

ROGER T. FOLEY. [712]

State of Nevada,
County of Washoe—ss.

On this, the 4th day of December, 1947, personally appeared before me, a Notary Public in and for the County of Washoe, Robert Z. Hawkins, known to me to be the Secretary-Treasurer of the corporation that executed the foregoing instrument, and upon oath did depose that he is an officer of the said corporation as above designated; that he is acquainted with the Seal of said corporation and that the Seal affixed to said instrument is the Corporate Seal of said corporation; that the signature to said instrument was made by an officer of said

corporation as indicated after said signature; that the said corporation executed the said instrument freely and voluntarily and for the uses and purposes therein mentioned.

Subscribed and sworn to before me, this 4th day of December, 1947.

[Seal] /s/ RUTH T. QUIVEY,
Notary Public.

My Commission expires March 15, 1948.

State of Nevada,
County of Washoe—ss.

On this 4th day of December, 1947, personally appeared before me, a Notary Public in and for the County of Washoe, Howard Parish, known to me to be the person whose name is subscribed to the within instrument as the Attorney in Fact of the American Surety Company of New York, and acknowledged to me that he subscribed the name of the said American Surety Company of New York thereto as principal and his own name as Attorney in Fact, freely and voluntarily and for the uses and purposes therein mentioned.

Subscribed and sworn to before me, this 4th day of December, 1947.

[Seal] /s/ LUCILE HANES,
Notary Public.

My Commission expires Sept. 27, 1950.

[Endorsed]: Filed Dec. 4, 1947. [713]

[Title of District Court and Cause.]

DESIGNATION OF RECORD ON APPEAL

Appellant, Mission Corporation, acting through its attorneys, designates the following portions of the record, proceedings and evidence to be contained in the record on appeal in this action: [714]

1. Complaint (All Exhibits to Complaint are omitted as they are identical with Exhibits A to D inclusive attached to Amended Complaint, hereinafter designated as Document No. 13).
2. Summons (and Return of Service).
3. Order Fixing Time for Hearing Application for Temporary Injunction.
4. Motion for Leave to Serve Written Interrogatories Upon Adverse Party and Affidavit of Garrett Logan Attached.
5. Order Granting Leave to Serve Written Interrogatories Upon Adverse Party.
6. Interrogatories.
7. Affidavit of Service (of Interrogatories).
8. Motion for Leave to Take Depositions and Affidavit of Garrett Logan Attached.
9. Order Granting Leave to Take Depositions.
10. Affidavit (by John P. Thatcher that Resident Agent of Mission Corporation is temporarily absent from the State of Nevada).
11. Affidavit of Service (of the aforesaid document numbers 3, 4, 5, 6, 8, 9 and 10 by mailing to Mission Corporation).
12. Motion to Dismiss.
13. Amended Complaint (and All Exhibits).

14. Answer to Amended Complaint.

15. Subpoena Duces Tecum (directed to Robert Ziemer Hawkins, dated November 14, 1947).

16. Subpoena Duces Tecum (directed to Robert Ziemer Hawkins, dated November 18, 1947).

17. Subpoena Duces Tecum (directed to William G. Skelly, dated November 20, 1947).

18. Answers to Plaintiff's Interrogatories (includes both questions and answers).

19. Affidavit of Service (by Harold C. Stuart dated November 24, 1947). [715]

20. Affidavit, including exhibits thereto attached, filed on behalf of the plaintiff, William G. Skelly, as follows:

(a) Affidavit of Leo A. Achtschin.

(b) Affidavit of Chesley C. Herndon.

(c) Affidavit of Arch H. Hyden.

(d) Affidavit of William G. Skelly.

(e) Affidavit of Harold C. Stuart.

21. Affidavits, including exhibits thereto attached, filed on behalf of the defendant, Mission Corporation, as follows:

(a) Thomas A. J. Dockweiler.

(b) George A. Hammer.

(c) Emil Kluth.

(d) Raymond F. Kravis.

(e) J. Kroupa.

(f) Charles F. Krug.

(g) Caleb S. Layton.

(h) Charles H. Schimpff.

(i) David T. Staples.

(j) Harold J. Wasson.

(k) Clarence H. Wright.

22. Stipulation (dated November 26, 1947, permitting substitution of lithographic copy for original of letter and minutes).

23. Exhibits submitted in evidence by the plaintiff as follows:

I. Plaintiff's Exhibit "1" (marked copy of Mission proxy statement).

II. Plaintiff's Exhibit "2" (letter and draft of Minutes of Directors' Meeting).

III. Plaintiff's Exhibit "3" (Depositions of Messrs. Dockweiler and Getty and Notice to Take Oral Depositions and Affidavit of Service of said Notice attached to said Depositions). [716]

24. Exhibit submitted in evidence by the defendant as follows:

I. Defendant's Exhibit "A" (Sunray proxy statement).

25. Order and Findings on Application for Preliminary Injunction dated December 2, 1947.

26. Affidavit of Service (of the aforesaid Order upon Mission Corporation).

27. Affidavit of Service (of the aforesaid Order upon Robert Z. Hawkins, Lester D. Summerfield and Arthur M. Boal, counsel for Mission Corp.

28. Bond for Temporary Injunction.

29. Motion for Supersedeas.

30. Order denying Motion for Supersedeas.

31. Notice of Appeal to Circuit Court of Appeals.

32. Bond for costs on Appeal.

33. Points upon which appellant intends to rely on this appeal are as follows:

(a) The court erred in not dismissing the action for failure of the appellee's complaint to state a claim within the jurisdictional amount of the court.

(b) The court erred in not dismissing the action for failure of the appellee's complaint to state a claim upon which relief can be granted.

(c) The court erred in ruling that the directors' meeting of Mission Corporation held on October 18, 1947, and the resolution adopted at such meeting approving the agreement of merger, were nullities.

(d) The court erred in granting a preliminary injunction restraining the appellant Mission Corporation from holding on December 6, 1947, or at [717] any other time, a stockholders' meeting to consider and vote upon the said agreement of merger considered and acted upon by the appellant's Board of Directors on October 18, 1947, and further restraining the said appellant from proceeding further with said proposed merger.

(e) The court erred in holding that Directors Kluth, Williams and Staples were disqualified, by reason of financial interest, from approving and signing the agreement of merger considered by the Board of Directors at its meeting on October 18, 1947.

(f) The court erred in holding that Directors Kluth, Williams and Staples were influenced and controlled by Director Thomas A. J. Dockweiler.

(g) The court erred in holding that the principal interest and purpose of Director Thomas A. J. Dockweiler on October 18, 1947, or at any time throughout the negotiation of said proposed merger, was to bring about the sale of stock of Pacific Western Oil Corporation owned by the Getty interests for $68.00 per share.

(h) The court erred in holding that the ratios of exchange for Pacific stock and the stock of the Remaining Stockholders of Mission provided for in the proposed merger agreement, were unequal or were arrived at without an appraisal of the constituent companies by an independent appraiser.

34. This "Designation of Record on Appeal."

The foregoing Designation of Record on Appeal is submitted [718] by counsel for the appellant.

HAWKINS, RHODES &
HAWKINS,
By /s/ ROBERT Z. HAWKINS,
/s/ LESTER D. SUMMERFIELD.

TOMPKINS, BOAL &
TOMPKINS,
By /s/ ARTHUR M. BOAL,
Attorneys for Appellant and Defendant, Mission Corporation.

Service of the foregoing Designation of Record on Appeal, by copy, is hereby acknowledged at Dec. 8th, 1947, at 5:15 p.m.

By /s/ HAROLD C. STUART,
Of Counsel for said Appellee and Plaintiff,
Attorneys for Appellee and
Plaintiff, William G. Skelly.

It is hereby stipulated by and between counsel for the above-named appellant and defendant, Mission Corporation, and William G. Skelly, appellee and plaintiff, that the Clerk of the United States District Court, in and for the District of Nevada, may send the above record by a special messenger, Frank Mallory, to the Clerk of the Circuit Court of Appeals.

/s/ ROBERT Z. HAWKINS,
Of Counsel for Defendant.

[Endorsed]: Filed Dec. 8, 1947. [719]

[Title of District Court and Cause.]

MINUTES OF COURT DECEMBER 8, 1947

It appearing that the Affidavit of Fero Williams, filed herein on November 20, 1947, was inadvertently omitted from appellant's Designation of Record on Appeal, and upon request of counsel for the appellant, It Is Ordered that the said Affidavit of Fero Williams be, by the Clerk of this Court, included in the certified transcript of record on appeal. [720]

[Title of District Court and Cause.]

DESIGNATION OF APPELLEE

Appellee, William G. Skelly, by and through his attorneys, designates the following portions of the record, proceedings and evidence to be contained in the record on appeal in this action:

1. Transcript of proceedings prior to the arguments.
2. Exhibits submitted in evidence by the plaintiff as follows:

   I. Exhibits "A," "B," "C," and "D" to Amended Complaint (attached to Amended Complaint, included in Appellant's Transcript).

   II. Marked portions of Mission Proxy Statement, being on pages 3, 4, 5, 6, 7, 8, 10, 15, and 27, also Exhibit D-1 thereto (Financial Statement of Pacific [1*] Western Oil Corporation) pages 2, 3, 4, Exhibit E-1 thereto (Financial Statements of Mission Corporation), pages 2 and 3, and Exhibit G thereto (Sunray Oil Corporation Pro Forma Financial Statements), pages 2 and 3—Plaintiff's Exhibit 1 (included in Appellant's Transcript).

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*Page numbering appearing at foot of page of original certified Transcript of Record.

III. Letter dated November 13, 1947, to W. G. Skelly with drafts of minutes of Mission Directors' Meeting of October 18, 1947, attached. Plaintiff's Exhibit 2 (included in Appellant's Transcript).

IV. Deposition of Thomas A. J. Dockweiler and George Franklin Getty II. Plaintiff's Exhibit 3 (included in Appellant's Transcript).

V. Portion of page 5 of Mission Proxy Statement, Proof of November 6, 1947 (page 20, line 20, and page 26 of Court Reporter's Transcript). Plaintiff's Exhibit 4 (not in Appellant's Transcript).

VI. Portion of pages 4 and 5 of Defendant's Exhibit A being "Notice of Meeting and Proxy Statement of Sunray Oil Corporation" (included in Appellant's Transcript). This portion read into record (page 23, line 24, and page 27 of Court Reporter's Transcript).

VII. Defendant's answer to Plaintiff's Interrogatories (see page 19 of Court Reporter's transcript. Note: This is not Plaintiff's Exhibit 4 as shown by Appellant's Transcript; no number was apparently given to this exhibit.

3. Affidavits, including exhibits thereto attached, filed on behalf of plaintiff William G. Skelly, as follows:

(a) Affidavit of William G. Skelly with Exhibits 1-8 inclusive and letter and telegram of November 25, 1947, attached.

(b) Affidavit of Chesley C. Herndon.

(c) Affidavit of Arch H. Hyden.

(d) Affidavit of Leo A. Achtschin.

(e) Affidavit of Harold C. Stuart.

(Note: All these affidavits included in Appellant's Transcripts.) [2]

4. This Designation of Appellee.

JOHN P. THATCHER,
WILLIAM J. FORMAN,
VILLARD MARTIN,
GARRETT LOGAN,
THEODORE RINEHART,
HAROLD C. STUART,
Attorneys for Appellee and
Plaintiff, William G. Skelly.

Proof of Service

State of Nevada,
County of Ormsby—ss.

I, Harold C. Stuart, of lawful age, being first duly sworn on oath, state that I am one of the attorneys of record for William G. Skelly, plaintiff and appellee in the above entitled action; that on the 9th day of December, 1947, at Carson City, Nevada, I mailed to Messrs. Hawkins, Rhodes and Hawkins and Robert Z. Hawkins, 153 N. Virginia Street, Reno, Nevada, attorneys for the appellant and de-

fendant in said action, a true copy of the above and foregoing "Designation of Appellee."

HAROLD C. STUART.

Subscribed and sworn to before me this 9th day of December, 1947.

[Seal] AMOS P. DICKEY,

Clerk, United States District Court for District of Nevada.

[Endorsed]: Filed Dec. 9, 1947. [3]

In the District Court of the United States
in and for the District of Nevada

No. 669

WLLIAM SKELLY,

Plaintiff,

vs.

MISSION CORPORATION, a Corporation,

Defendant.

Before: Hon. Roger T. Foley,
Judge.

HEARING ON MOTION FOR TEMPORARY INJUNCTION

November 21, 1947

Appearances:

Thatcher, Woodburn & Forman, by William Forman, John P. Thatcher; Garret Logan, Theodore Rheinhart, Villard Martin, Harold C. Stuart, Attorneys for Plaintiff.

Lester D. Summerfield, Bryce Rhodes, Arthur M. Boal, Attorneys for Defendant.

Springmeyer & Thompson, by Bruce R. Thompson; William L. Hanaway, Edward Howell, Attorneys for Sunray Corporation. [4]

Norman Sterry, David S. Hecht, Robert Hawkins, Henley Prince, John Belford, Attorneys on behalf of Western Oil Corporation.

George Rosier, Albert Hillard, Attorneys on behalf of Investment Associates, Inc.

* * * * * * *

Mr. Logan: If your Honor please, it has heretofore been stipulated that Exhibit A to the amended complaint, being contract between Sunray and Getty interests, is a correct copy and we submit it in evidence. It has likewise been agreed that Exhibit B to the amended complaint, which is a copy of the proposed merger agreement, is a correct copy of the document and we submit it in evidence. Then I believe a statement from Mr. Boal as representing Mission, that copy of the proxy statement furnished me is a correct copy of the statement may be admitted in evidence in this case. I do not desire to offer all because there are some things in it that I do not consider binding. There are some portions of it that I desire to offer as admission for the plaintiff.

Mr. Boal: I think the whole should be admitted, your Honor.

Mr. Logan: I am perfectly willing to file or introduce the whole, but I do not want to——

Mr. Boal (interrupting): I would like to have the whole proxy statement before the court.

The Court: I think that is better.

Mr. Logan: I do not want to be bound by all the statements in it.

The Court: You point out then the portions that you do not want to be bound by.

Mr. Logan: I do not want to be bound by any portion of the proxy statement except that portion of it beginning on [16] page 3 and being the fourth paragraph on that page, reading (reads): I have a copy marked of what I want to include and with permission of the Court I would like to introduce it and not be bound by anything not marked and will give opposing counsel a copy.

The Court: It will be so understood. That statement may be admitted in evidence.

Mr. Logan: I will be bound only by the portions marked.

The Court: With that understanding.

Mr. Logan: We offer that as our exhibit.

The Court: Plaintiff's Exhibit No. 1.

Mr. Logan: I also wish to offer in evidence, or to have considered as in evidence, Exhibits C and D to the amended bill of complaint, which as I understand it, are admitted by Mr. Sterry.

Mr. Sterry: That is correct.

Mr. Logan: Your Honor, may I have order of the Court that the depositions which I hold in my hand be opened, filed and published?

The Court: They may be opened.

Mr. Logan: They are depositions of Mr. Dockweiler and Mr. Getty.

The Court: I have a letter from a stockholder who is intervening through the mail, Mr. Schwartz.

Mr. Logan: Mr. Rheinhart, will you take the original [17] of this deposition and answer the questions? If the Court please, to conserve time.

Mr. Summerfield: May we consider the depositions and affidavits read and let counsel refer to what he wants?

The Court: They will be so considered. Is that satisfactory?

Mr. Logan: Yes, sir. We offer the depositions then in evidence.

The Court: All exhibits offered at this time are admitted in evidence.

Mr. Logan: I have asked for the minutes of directors' meeting of Mission held on October 18, 1947, at San Diego. I would like to inquire if those have been produced.

Mr. Hawkins: I can answer that. Mr. Skelly has a copy.

Mr. Logan: I have, if the Court please, a letter from Mr. Hawkins addressed to Mr. Skelly. (Reads.) We offer this in evidence as our exhibit.

The Court: Admitted in evidence as Exhibit 2.

Mr. Sterry: In the interest of time, your Honor, I offer all documents offered by any party may be received in evidence and considered read.

The Court: Yes. The deposition will be Exhibit 3.

Mr. Logan: What I have here is some stock market prices and I wonder if they can be agreed upon. That on the [18] 4th day of October Pacific Western prices on the New York stock exchange were open 52, low 51, close at 51¾. That on November 3rd Mission Corporation, being listed on that stock exchange, the market prices were open 50½, low 49¾, close at 50½. That on that same date Skelly stock prices, also listed on the New York exchange, were open 101⅛, low 98, close 100.

Mr. Summerfield: Are those from official stock exchange records?

Mr. Logan: I will state to you that they have been furnished to me by your brokers in Reno as being the prices.

Mr. Summerfield: No objection.

Mr. Logan: Mr. Heiden, will you be sworn?

Mr. Summerfield: We object to any oral testimony in this case and are willing to stipulate that the matter be submitted on affidavits and if not prepared can be prepared and filed by Monday, but if we once get into oral testimony, we will never finish. We have the right to cross-examine and offer oral testimony on our side.

The Court: Can't this be handled in affidavit form?

Mr. Logan: Yes, your Honor, we can submit affidavits and we will do that. I should like to state to the Court that there is a portion of Mission proxy statement that I did not have marked that I do want to have before the Court for consideration and that consists of Sunray Oil Corporation balance

sheet of December 31, 1946. It is Exhibit C-1, page 2 and page 3 and the notes on page 6 and page 7. Also Exhibit D-1, the balance sheet of Western Pacific Oil Corporation, a subsidiary company, being on pages 2, 3 and 4 of that exhibit. On Exhibit E-1 the proxy statement, the balance sheet of Mission Corporation and the notes thereto, being pages 2 and 3 of that exhibit. And Exhibit G-1, pages 2 and 3 of that exhibit, being what is denominated "Pro Forma Condensed Consolidated Balance Sheet." I should like now to offer in evidence the following language from a proof of November 6, 1947, of the Mission proxy statement.

Mr. Boal: I object to statements of proof. We have final proxy statement, which speaks for itself. I do not think we should go through preliminary proof which is subject to correction.

Mr. Logan: Here is what I want to put in evidence, if the Court please, if I may be permitted to offer it.

Mr. Boal: We object to it.

The Court: I would like to hear the offer.

Mr. Logan (reads): "As set forth below under the heading 'Purchase by Sunray' * * * $68." I offer that in evidence. [See page 26.]

The Court: What is the grounds for your objection?

Mr. Boal: That it is statement made and proved which hasn't been proved by any one. The only thing that was filed [20] with the Securities and Exchange Commission is the final proxy statement.

Mr. Hecht: That statement is some young lawyer's idea of what took place.

The Court: Objection will be overruled. It may be admitted in evidence. If you have anything to the contrary, you may offer it. That will be admitted in evidence as Exhibit No. 4.

(Recess for 10 minutes.)

Mr. Thatcher: If the Court please, we ask the Court's indulgence in dividing the time procedure. We have the plaintiff in this case. His examination will be extremely short and we believe the Court should have the opportunity of judging the credibility of that witness, since that witness is the plaintiff and the Court has no such opportunity where it is faced only with broad statements. That is the only oral testimony which we seek to present.

Mr. Summerfield: Your Honor, we would never complete it if that was offered. This is a hearing on preliminary injunction. If he takes the stand, we have the right to cross-examination.

The Court: I think we will stay with the plan we have decided upon.

Mr. Logan: Your Honor please, I should like to have considered as a part of the evidence in this case the defendant's [21] answer to plaintiff's interrogatories, which I think were filed with the clerk yesterday. I should like to have that considered as a part of our proof in this matter, the Mission Corporation's answer to interrogatories which have been filed in this matter.

The Court: That will be so considered and may be marked as an exhibit.

Mr. Logan: If your Honor please, as I understand it, we will be given an opportunity to present affidavits in lieu of the oral testimony we have planned to offer here today.

The Court: That was the understanding.

Mr. Summerfield: It was the understanding that you would be given that opportunity for a date and the time fixed which was next Monday.

Mr. Logan: I think Monday is a little quick. I would appreciate it if we could have until Wednesday, or Tuesday.

Mr. Summerfield: We also suggest as part of that that we file briefs simultaneously on Tuesday.

The Court: You may have until Wednesday to get your affidavits in and that will apply to both sides. It will be understood that affidavits and briefs will be presented Wednesday.

Mr. Logan: That is all the plaintiff has to offer except for the affidavits that will be furnished, except *with* [22] *As* I said, we have one additional piece of evidence I should like to offer. In view of the statement made by Mr. Hecht, I should like to offer in evidence the following extract from Notice of Meeting and Proxy Statement of Sunray Oil Corporation.

Mr. Hecht (interrupting): We have no objection if the entire thing goes into evidence. I think it is an exhibit to the affidavit of Mr. Wright and I suggest the entire document be received in evidence and Mr. Logan be permitted to refer to such portions he wants.

Mr. Logan: I do not offer the entire document.

Mr. Hecht: We are willing to offer it in evidence.

Mr. Hanaway: My name is Hanaway. I am counsel for the Sunray Oil Corporation. I do not think that the proxy statement is attached to Mr. Wright's affidavit. I want that to be understood by counsel at this point. It has not been attached.

Mr. Hecht: We are willing to offer it.

Mr. Hanaway: Sunray Oil Corporation also is willing to offer it.

The Court: It may be admitted in evidence as Defendant's Exhibit A.

Mr. Logan: I desire to read this portion of it. It is beginning at the bottom of page 4. (Reads:) "As set forth below under the heading * * * $68." [See page 27.] [23]

The Court: That will be considered in evidence, in part, that portion of the exhibit read.

Mr. Logan: With proof heretofore offered, your Honor, and affidavits to be submitted, that will constitute all the proof on our application for temporary injunction.

The Court: And also on the motion to dismiss?

Mr. Logan: Yes, if your Honor please.

The Court: In the event intervention is granted in each instance the affidavits that are in support of the several interveners will be admitted. Otherwise they are not.

Mr. Hanaway: In the event motion to intervene is granted, we would also like to have affidavit submitted on behalf of Mission Corporation applicable to the Sunray Corporation, in the event it is allowed to come in as intervener.

The Court: I am wondering if you are not trying to evade the ruling of the court. My intention was to not at this time admit affidavits filed by any interveners and I wonder if this is a way of getting around the Court's ruling by having the party now in court make the motion. Now I am not going to permit that.

Mr. Hanaway: No, so far as Sunray is concerned, there was no such intention. It is all subject to your ruling.

The Court: I am not going to permit that to be done. [24] No affidavits will be admitted on behalf of any intervener unless and until motion to intervene is granted.

Mr. Hanaway: That is the basis upon which I made my tender.

The Court: Do you care to proceed with the argument at this time?

(Arguments follow.) [25]

(The following is the portion of the Mission Proxy Statement Proof of November 6, 1947, read into the record by Mr. Logan at page 17, line 20:)

"As set forth below under the heading 'Purchase by Sunray of Capital Stock of Pacific' Sunray has agreed to purchase, subject to certain conditions, approximately 85% of the Capital Stock of Pacific at the price of $68 per share and intends to invite tenders of the balance of such stock at the same price. The price of $68 per share was arrived at through arms' length negotiations with the sellers. Relatively

little weight was given to the market price on the New York Stock Exchange of Capital Stock of Pacific which on the date of the agreement was approximately $52 per share. The basis of the conversion of shares of Capital Stock of Pacific not tendered into shares of 1947 Prior Preferred Stock of Sunray was arrived at through arms' length negotiations with the management of Pacific and the cash price of $68 per share referred to above was the most important factor in determining this basis. On the date of the Agreement of Merger the market price on the New York Stock Exchange of Capital Stock of Pacific was approximately $57 per share. The basis of the conversion of shares of Capital Stock of [26] Mission into shares of Common Stock of Sunray was arrived at through arms' length negotiations with the management of Mission. Again relatively little weight was given to the market price on the New York Stock Exchange of Capital Stock of Mission, which on the date of the Agreement of Merger was approximately $54 per share. On said date the market price on the New York Stock Exchange of six shares of Common Stock of Sunray was approximately $68."

(The following is the portion from pages 4 and 5 of Defendant's Exhibit A, "Notice of Meeting and Proxy Statement" of Sunray Oil Corporation, read into the record by Mr. Logan at page 20, line 24:)

"As set forth below under the heading 'Purchase by Sunray of Capital Stock of Pacific'

Sunray has agreed to purchase, subject to certain conditions, approximately 85% of the Capital Stock of Pacific at the price of $68 per share and intends to invite tenders of the balance of such stock at the same price. The price of $68 per share was arrived at through arms' length negotiations with the sellers. Relatively little weight was given to the market price on the New York Stock Exchange of Capital Stock of Pacific which on the date of the agreement was approximately [27] $52 per share. The basis of the conversion of shares of Capital Stock of Pacific not tendered into shares of 1947 Prior Preferred Stock of Sunray was arrived at through arms' length negotiations with the management of Pacific and the cash price of $68 per share referred to above was the most important factor in determining this basis. On the date of the Agreement of Merger the market price on the New York Stock Exchange of Capital Stock of Pacific was approximately $57 per share. The basis of the conversion of shares of Capital Stock of Mission into shares of Common Stock of Sunray was arrived at through arms' length negotiations with the management of Mission. Again relatively little weight was given to the market price on the New York Stock Exchange of Capital Stock of Mission, which on the date of the Agreement of Merger was approximately $54 per share. On said date the market price on the New York Stock Exchange of six shares of Common Stock of Sunray was approximately $68." [28]

State of Nevada,
County of Ormsby—ss.

I, Marie D. McIntyre, the duly appointed official court reporter in the United States District Court, in and for the District of Nevada, do hereby certify: That I was present and took verbatim shorthand notes of the proceedings had in the case entitled William G. Skelly, Plaintiff, vs. Mission Corporation, a corporation, Defendant, at the hearing on motion for temporary injunction held at Carson City, Nevada, on November 21, 1947, and that the foregoing pages, numbered 1 to 25 inclusive, comprise a true and correct transcript of my said shorthand notes of the proceedings had before the arguments and in the course of the arguments, to the best of my knowledge and ability.

Dated at Carson City, December 9, 1947.

/s/ MARIE D. McINTYRE,
Official Reporter.

[Endorsed]: Filed Dec. 9, 1947. [29]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK, U. S. DISTRICT COURT

United States of America,
District of Nevada—ss.

I, Amos P. Dickey, Clerk of the District Court of the United States for the District of Nevada, do

hereby certify that I am custodian of the records, papers and files of the said United States District Court for the District of Nevada, including the records, papers and files in the case of William G. Skelly, Plaintiff, vs. Mission Corporation, a corporation, Defendant, No. 669 on the civil docket of said Court.

I further certify that the attached transcript, consisting of 31 typewritten pages numbered from 1 to 31, inclusive, contains a partial transcript of the court proceedings in said case on November 21, 1947, being a portion of the record requested by appellee under Rule 75, subdivision J of the Federal Rules of Civil Procedure, as the same appears from the original of record and on file in my office as such Clerk in Carson City, State and District aforesaid.

I further certify that the cost of preparing and certifying to said record, amounting to $18.40, has been paid to me by Harold C. Stuart, one of the attorneys [30] for the appellee.

Witness my hand and the seal of said United States District Court this 9th day of December, 1947.

[Seal] /s/ AMOS P. DICKEY,
Clerk, U. S. District Court.

PLAINTIFF'S EXHIBIT No. 2

New York, N. Y.

Mr. W. G. Skelly, President
Skelly Oil Company
Skelly Oil Building
Tulsa 2, Oklahoma

Enclosed is a draft copy of the minutes of the October 18th meetings. They are still subject to change pending my getting home and making a final considered review of my notes.

Sincerely yours,

/s/ BOB HAWKINS.

Enc.

Received 11/13/47, 10 a.m. [523]

MISSION CORPORATION

Special Meetings of the Board of Directors

October 18, 1947

Minutes of the Special Meetings of the Board of Directors of Mission Corporation Held at Skelly Oil Company. Skelly Oil Building, Tulsa, Oklahoma, Pursuant to Section 10, Article 13, of the By-Laws.

The meetings were called at 9:30 o'clock in the forenoon, Central Standard Time, pursuant to due notice and due supplemental notice thereof, which with due proof of the service thereof, were ordered annexed to the minutes of the meetings.

Plaintiff's Exhibit No. 2—(Continued)

The following Directors were present in person:

Messrs. W. G. Skelly, Arthur M. Boal, Thomas A. J. Dockweiler, Arch H. Hyden, Emil Kluth, Fero Williams,

constituting more than a quorum. Director B. I. Graves was absent.

The meeting was called to order and presided over by W. G. Skelly, President. Robert Z. Hawkins, Secretary, acted as Secretary of the meeting and kept the minutes thereof.

The president announced that the first order of business was the approval of the minutes of the organization meeting of the Board of Directors held at Reno, Nevada, on May 8, 1947, and that copies of the minutes of that meeting had been mailed to all of the directors. It was moved by Mr. Boal and seconded by Mr. Kluth that the minutes of the aforesaid organization meeting as submitted be approved. The motion was unanimously carried.

The president presented and read the resignation of B. I. Graves as a director to take effect immediately. It was moved by Mr. Dockweiler and seconded by Mr. Williams that the [524] resignation of Mr. Graves as a director be accepted with deep and sincere regrets and that the secretary express the great appreciation of the Board for the services of Mr. Graves as such director and that the resignation be filed with the records of the corporation. The motion was unanimously carried.

Plaintiff's Exhibit No. 2—(Continued)

The president announced that the next order of business was the filling of the vacancy created by the resignation of Mr. Graves. Mr. Williams nominated David T. Staples as director to fill the vacancy in the office of director caused by such resignation of Mr. Graves. Said nomination was seconded by Mr. Kluth. Mr. Skelly nominated George F. Getty II as director to fill the vacancy in the office of director caused by such resignation. Said nomination was seconded by Mr. Hyden. In the absence of any other nomination, Mr. Dockweiler moved to close the nominations and the motion was seconded by Mr. Kluth and unanimously carried. The directors were then polled and voted as follows:

For David T. Staples: Messrs. Boal, Dockweiler, Kluth and Williams.

For George F. Getty II: Messrs. Skelly and Hyden.

The president then announced that Mr. Staples had received a majority of the votes cast and that he was duly elected a director of Mission Corporation to serve until the next annual meeting of the stockholders of said corporation and until his successor shall have been elected and shall have qualified.

Mr. Staples was then called into the meeting, accepted the office of such director and thereafter took part in the meeting.

The president announced that the next order of business was to authorize the execution of a proxy

Plaintiff's Exhibit No. 2—(Continued)

to vote the shares of Skelly Oil Company held by this corporation at the annual meeting of stockholders of Skelly Oil Company to be [525] held on the 18th day of October, 1947, at 11 o'clock in the forenoon, Central Standard Time, at the offices of Skelly Oil Company, Skelly Building, Tulsa, Oklahoma.

Mr. Dockweiler moved the following resolution which was duly seconded by Mr. Williams:

> Resolved, That the officers of the corporation, for and on behalf of the corporation, be and they hereby are authorized and empowered to make, execute and deliver a proxy to Skelly Oil Company in the name of this corporation designating and appointing David T. Staples, Arthur M. Boal and Robert Z. Hawkins, and each of them (with full power to act without the others) the attorneys and proxies with full power of substitution to vote upon all the shares of the capital stock of Skelly Oil Company standing in the name of this corporation at the annual meeting of stockholders of Skelly Oil Company to be held in the office of said corporation, Skelly Building, Tulsa, Oklahoma, on October 18, 1947, at 11:00 o'clock a.m., Central Time, and at any adjournment or adjournments thereof (1) to elect ten directors to hold office for the ensuing year and until the election and qualification of their successors, and (2) for the transaction of such

Plaintiff's Exhibit No. 2—(Continued)

other and further business as may properly come before the meeting or any adjournments thereof, and further

Resolved, That said proxies be and they hereby are authorized and directed to vote the said shares in favor of the election of the following named persons as directors of Skelly Oil Company or if any of such persons shall be unavailable for the office of directors, in favor of the election of such other persons as they in their discretion may determine:

W. G. Skelly
C. C. Herndon
Edward Groth
D. T. Staples
T. A. J. Dockweiler
Fero Williams
Emil Kluth
S. E. Cavanaugh
Arthur M. Boal
O. M. Evans

and further

Resolved, That the Secretary or an Assistant Secretary of the corporation be and he hereby is directed to affix the corporate seal to such proxy and attest the same. [526]

This motion was then discussed, and after due consideration it was adopted by a majority vote.

The president then announced that the resolution had been adopted and directed the secretary

Plaintiff's Exhibit No. 2—(Continued)

to issue under the corporate seal a proxy in accordance with the resolution.

The president announced that the next order of business was the appointment of auditors for the 1947 annual audit of Mission Corporation. Upon motion duly made, seconded, and unanimously carried it was

> Resolved, that subject to the approval by the president of the basis of their compensation, the officers of the corporation, in the name of and for and on behalf of the corporation be and they hereby are authorized to retain the accounting firm of Arthur Andersen & Co. to make and render the corporation's audit for the year ended December 31, 1947.

The president announced that the next order of business was consideration and action with respect to the declaration of a dividend. After discussion and upon motion duly made, seconded and unanimously carried, it was

> Resolved, that a cash dividend in the sum of Seventy-five Cents (75c) on the issued and outstanding shares of the capital stock of the Mission Corporation (except such of said shares as are owned and held by Mission Corporation as of November 15, 1947) be, and the same hereby is, declared payable and distributable on December 15, 1947, to all shareholders of Mission Corporation of record at the close of business on November 15, 1947 and that proper notice thereof be published; and be it

Plaintiff's Exhibit No. 2—(Continued)

Further Resolved, that a list of all shareholders of Mission Corporation of record at the close of business on November 15, 1947, be taken; and be it

Further Resolved, that the officers of this corporation in the name of and for and on behalf of this corporation be, and they hereby are, authorized, empowered and directed to do all things necessary and proper for the purpose of carrying out the intent and purpose of this resolution.

The president announced that the next order of business was considering and taking action with respect to the replacement of certain lost stock certificates. The following resolution [527] was then presented:

Whereas, the following parties have represented to this Company that a certificate of the common stock of this Company standing in their respective names, or in the respective names of deceased persons legally represented by them, and representing the number of shares of the common stock of this Company hereafter shown, has been lost, destroyed or stolen,

Name and Address	Cert. No.	Full Shares Amt.
Rosetta Heimhofer 224 N. Main Street, Findlay, Hancock County, State of Ohio.....	027396	5
Johan Larsson 240 - 94th Street Brooklyn 9, New York	036048	6
	036049	2
Katherine T. Dickinson 1548 Union Avenue, Memphis, Tenn.....	015869	2

Plaintiff's Exhibit No. 2—(Continued)

and

Whereas, each of the foregoing has furnished this Company with a bond of indemnity in the premises and has requested it to issue and register a certificate in their respective names in like manner of shares in lieu of said certificates so lost, destroyed or stolen,

Now, Therefore, Be It Resolved, that Guaranty Trust Company of New York as Transfer Agent is hereby authorized and directed to issue certificates in the respective names of the above named covering the respective full shares of the common stock of this Company as above set forth, and The Chase National Bank of the City of New York as Registrar, hereby is authorized and directed to register such respective certificates covering full shares of the common stock of this Company and that such certificates when so issued and registered be delivered to the above named parties.

Upon motion duly made and seconded, the resolution was unanimously adopted.

The president then announced that The Guaranty Trust Company, transfer agent of the corporation, had suggested the advisability of the corporation's adopting their form of resolution permitting two officers of Mission Corporation to approve the issuance of stock certificates upon submission of proper documents and indemnity bonds without the necessity of delaying such action until a subsequent

Plaintiff's Exhibit No. 2—(Continued)

meeting of the board [528] of directors. The following resolution was then presented:

> Whereas, it has been found in some cases to work a hardship on stockholders whose certificates of stock or scrip have been lost, stolen or destroyed, to compel them to await the action of the Board of Directors before a new certificate may be issued in place of such lost, stolen or destroyed certificates;
>
> Now, Therefore Be It Resolved that any two of the officers of this Company, to wit, a Director, President, Vice-President, Treasurer, Secretary are hereby empowered to authorize the respective Transfer Agent and Registrar to issue and register a replacement Certificate or certificates of stock of this Company in place of certificates lost, stolen or destroyed, or to make payment of the redemption value of the bearer scrip certificates lost, stolen or destroyed, upon the Company's receiving satisfactory proof of such loss or destruction or theft, and a proper bond of indemnity running to this Company, its Transfer Agents and Registrars, respectively, indemnifying them and each of them against all loss or damage.

Upon motion duly made and seconded, the resolution was unanimously adopted.

The president then announced that the next order of business was consideration of the advisability of sending out a change-of-address card with each divi-

Plaintiff's Exhibit No. 2—(Continued)

dend check, and after due consideration thereof, on motion duly made and seconded, it was unanimously

Resolved, that a printed card substantially in words and figures as follows, be enclosed with each check in payment of each common stock dividend:

Mission Corporation
153 North Virginia Street,
Reno, Nevada

To the Stockholder:

This form should be used to notify us of any change or correction in your adress:

Mission Corporation
153 North Virginia Street
Reno, Nevada

Please note change of address of undersigned as follows:

Old Address:	New Address:
Name	Name
Street	Street
Place	Place
Certificate No.	Number of Shares.....
Date:.....19	.....

Signature of Stockholder

(Sign in full just as on stock certificate)

The president then announced that the next order of business was consideration of action regarding the account with The First National Bank of the

Plaintiff's Exhibit No. 2—(Continued)

City of New York. After discussion, upon motion duly made and seconded, it was unanimously

Resolved, that The First National Bank of the City of New York is designated a depositary of this corporation; and

Further Resolved, that all drafts, checks, and other instruments or orders for the payment of money drawn against the account or accounts of this corporation shall be signed by any two of the following:

D. T. Staples	Fero Williams
Emil Kluth	Robert Z. Hawkins

Further Resolved, that the depositary above designated is authorized to place to the credit of the account, or any of the accounts, of this corporation, funds, drafts, checks or other property delivered to it for deposit for account of this corporation, whether or not endorsed with the name of this corporation by rubber stamp, facsimile, mechanical, manual or other signature, and any such endorsement by whomsoever affixed shall be the indorsement of this corporation, provided that if any such funds, drafts, checks or other property shall bear, or be accompanied by, directions (by whomever made) for deposit to a specific account, then such deposit shall be to the credit of such specific account; and

Further Resolved, that the depositary is hereby directed to accept and/or pay and/or

Plaintiff's Exhibit No. 2—(Continued)

apply without limit as to amount, without inquiry and without regard to the application of any such draft, check, instrument or order for the payment of money, or the proceeds thereof, any draft, check, instrument or order for the payment of money drawn on such account or accounts, which draft, check, instrument or order for the payment of money bears the signature or signatures as required by these resolutions, including drafts, checks, instruments or orders for the payment of money, to the order of any person whose signature appears thereon, or of any other officer or officers, agent or agents of this corporation, which may be deposited with, or delivered or transferred to, the depositary or to any other person, firm or corporation, for the personal credit or account of any such officer or agent; and the depositary shall not be liable for any disposition which any such officer or agent shall make of all or any part of any draft, check, instrument or order for the payment of money drawn on such account or accounts or the proceeds thereof, notwithstanding that such disposition may be for the personal account or benefit or in payment of the individual obligation of any such officer or agent to the depositary or otherwise. [530]

The president announced that the next order of business was consideration and action regarding

Plaintiff's Exhibit No. 2—(Continued)

a dividend account for common stock dividend No. 18. The following resolution was then presented:

Whereas, by resolution duly adopted by the Board of Directors of this Corporation on October 18, 1947, a dividend in the sum of Seventy-five Cents (75c) per share on the issued and outstanding shares of the common stock of the corporation was declared payable and distributable on December 15, 1947, to stockholders of the corporation of record as at the close of business November 15, 1947; and

Whereas, in connection therewith it will be necessary to create and open a dividend account with a Bank, Trust Company or other dividend disbursing agent to provide for the disbursement of such dividend;

Now, Therefore, Be It Resolved, that the officers of the corporation, for and on behalf of the corporation, be, and they hereby are, authorized and empowered to open a dividend account with The Security National Bank, Reno, Nevada, and The First National Bank of the City of New York, New York, New York; and be it further

Resolved, that the officers of the corporation be authorized to transfer or cause to be transferred to such accounts the sum of One Million and Thirty Thousand and Six Hundred and Eight and Seventy-five One Hundredths Dollars ($1,030,608.75) which funds shall be subject to

Plaintiff's Exhibit No. 2—(Continued)

withdrawal upon checks or other orders when signed jointly, and for and on behalf of the corporation, by W. G. Skelly and Robert Z. Hawkins; and be it further

Resolved, that the said The Security National Bank and The First National Bank of the City of New York be authorized to honor and make payment upon checks or other orders issued for and on behalf of the corporation upon said dividend account bearing the facsimile signatures of W. G. Skelly and Robert Z. Hawkins; and be it further

Resolved, that the Treasurer of this corporation be authorized to make arrangements with said Banks for the payment of the aforesaid dividend in accordance with the rules and regulations of said Banks; and be it further

Resolved, that the Secretary of this corporation be, and he hereby is, authorized and directed to present certified copies of this resolution, in duplicate, to each of said Banks.

Upon motion duly made and seconded, the resolution was unanimously adopted.

Mr. Dockweiler moved the adoption of the following resolution, which was duly seconded by Mr. Williams and adopted [531] by the vote of all members of the board, except Messrs. Skelly and Hyden, who voted against the same:

Whereas, pursuant to Article III of the By-Laws of the corporation, the board of directors

Plaintiff's Exhibit No. 2—(Continued)

is empowered to appoint and remove, at their pleasure, officers of the corporation, now, therefore, be it

Resolved that the term of office of Mr. W. G. Skelly as president of the corporation be and it hereby is terminated, to take effect immediately, and further

Resolved that a vacancy is hereby declared to exist in the office of the president of the corporation.

Upon motion made by Mr. Dockweiler and seconded by Mr. Williams and adopted by the vote of a majority of the board, Mr. Staples not voting thereon, it was

Resolved that D. T. Staples be and he hereby is elected president of the corporation to fill the vacancy declared to exist in that office; to serve as such president until the first meeting of the board of directors following the next annual meeting of the corporation and until his successor shall have been duly elected and qualified.

Mr. Staples accepted his election to the office of president of the corporation and immediately assumed such office and took over the chairmanship of the meeting from Mr. Skelly.

Upon motion duly made, seconded and unanimously carried, it was resolved that the meeting be recessed until 3 o'clock that afternoon, to reconvene in the Board Room of the Skelly Oil Company

Plaintiff's Exhibit No. 2—(Continued)

in the Skelly Building, Tulsa, Oklahoma. The meeting thereupon recessed at 10:55 a.m., Central Standard Time, on October 18, 1947, to reconvene at 3 o'clock p.m., Central Standard Time, Saturday, October 18, 1947, at the place so designated. [532]

Recessed Special Meeting Which Resumed Its Deliberations at 3 o'Clock P.M., Central Standard Time, on October 18, 1947, in the Board Room of Skelly Oil Company, Skelly Building, Tulsa, Oklahoma.

The meeting resumed at 3 o'clock p.m., Central Standard Time on October 18, 1947, in the Board Room of Skelly Oil Company, Skelly Building, Tulsa, Oklahoma. The meeting was called to order and presided over by D. T. Staples, President. Robert Z. Hawkins, the Secretary, acted as secretary of the meeting, and kept the minutes thereof. In response to an inquiry by the President, the Secretary reported the following Directors present:

D. T. Staples	Emil Kluth
Arthur M. Boal	W. G. Skelly
Thomas A. J. Dockweiler	Fero Williams
Arch H. Hyden	

being all of the directors of the corporation.

The President announced that the next order of business was the consideration of an offer in writing dated the 18th day of October, 1947, from Sunray Oil Corporation to Mission Corporation to enter into an agreement of merger upon the terms and conditions set forth in the proposed agreement,

Plaintiff's Exhibit No. 2—(Continued)

providing for the merger subject to the terms and conditions set forth in said agreement.

David Hecht, Esquire, and Barnabas B. Hadfield, Esquire, were present at the meeting at the invitation of the President, Mr. Staples, to answer such questions as the Directors might wish to put to them concerning the merger. Mr. Skelly requested permission to have his personal counsel present, which request was granted, and Villard Martin, Esquire, of the Tulsa Bar, and Joseph A. Patrick, Esquire, of the New York Bar, were present at the meeting as Mr. Skelly's counsel. W. K. Petigrue, Esquire, counsel for Sunray Oil Corporation, was also present at the meeting and formally tendered the above-mentioned written offer of Sunray Oil Corporation and then retired. The President read the offer and directed that it be filed with the minutes of the meeting.

The President then stated that the offer of Sunray [533] Oil Corporation was open for discussion and extended discussion ensued in which all the directors took part. Many questions were directed to Mr. Hecht and to Mr. Hadfield, which they answered and then left the room. The discussion covered the market prices of the securities of the constituent corporations for the past few years, their status, businesses, earnings, indebtedness, reserves, acreage, production, properties and assets, the dividends paid by the constituent companies, the prospects of the surviving corporation, the continuity and changes in indirect ownership

Plaintiff's Exhibit No. 2—(Continued)

of assets and values of the constituent corporations, Mission Corporation's liquidating values and other related matters and factors.

Mr. Skelly presented the following resolution which was seconded by Mr. Hyden:

> Whereas, There has been presented to this Board of Directors this afternoon for the first time a proposed merger agreement between this corporation and the Sunray and Pacific Western Oil Corporations, and various other documents and material pertaining to such proposed Merger; and
>
> Whereas, This Board has heretofore taken no action authorizing or designating any person or persons to negotiate the aforesaid Agreement of Merger and the terms and conditions included therein, or to prepare the proxy material and other documents and material pertaining to such Merger which have been presented at this meeting for the approval of this Board; and
>
> Whereas, The members of this Board have not had sufficient time to read and consider the aforesaid documents and further, do not have a reliable opinion of disinterested counsel regarding the legality of the proposed Merger Agreement or any reliable information to enable it to consider the fairness of the terms and conditions of said Merger Agreement; and
>
> Whereas, It is necessary for the protection of the interests of all of the stockholders of

Plaintiff's Exhibit No. 2—(Continued)

this corporation that this Board have an opinion of reliable disinterested counsel regarding the legality of the proposed Merger Agreement and be fully informed regarding all the facts and circumstances affecting the proposed Merger Agreement and the fairness of the terms and conditions thereof;

Now, Therefore Be It Resolved, That this meeting be recessed until eleven a.m. on the 15th day of November, 1947; and further [534]

Resolved, That this Board designate a Committee to retain reliable disinterested counsel to render a written opinion regarding the legality of the said Merger Agreement, investigate all the facts and circumstances relating to the proposed Merger Agreement, secure all available information relating to the fairness of the terms and conditions contained therein including a common yardstick appraisal of the values of the constituent corporations and the Skelly Oil Company and deliver to each of the members of this Board a copy of the aforesaid legal opinion and a written report of the results of their investigation including the aforesaid available information relating to the fairness of the terms and conditions of said Merger Agreement, together with their recommendations regarding the acceptance of the terms and conditions of said Merger Agreement or the modification of such terms and conditions, as the case may be, for the consideration

Plaintiff's Exhibit No. 2—(Continued)

and action of this Board at the continuation of the meeting of this Board at eleven o'clock on November 15, 1947.

Mr. Skelly stated that he had not been consulted in connection with this particular merger. However it was pointed out that many weeks previous to this meeting he had been consulted about a proposed merger involving Mission Corporation, Pacific Western Oil Corporation, Skelly Oil Company and Sunray Oil Corporation and further he had been invited to Los Angeles to take part in discussions which were going on there regarding the matter and had failed to go to Los Angeles to attend such discussions, and that some days prior to this meeting he had been consulted regarding the proposed merger involving only Mission Corporation, Pacific Western Oil Corporation and Sunray Oil Corporation.

A number of directors expressed the opinion that they had sufficient data on hand and had already sufficiently examined into and analyzed the proposed merger between Mission Corporation, Pacific Western Oil Corporation and Sunray Oil Corporation and the data pertaining thereto to consider and pass upon such merger and its merits and to submit the same to the stockholders of Mission Corporation for their approval or rejection.

Certain of the directors indicated that such proposed merger had such merit and benefit to the Mission Corporation [535] stockholders that the

Plaintiff's Exhibit No. 2—(Continued)

directors might be considered delinquent in their duties to said stockholders if they did not submit it to the stockholders of Mission Corporation for their decision in the premises.

One director pointed out that if changing conditions occurred or if the information and data upon which they might base their approval subsequently proved to be inaccurate under the terms of the merger agreement Mission Corporation could withdraw from the merger agreement at any time prior to the stockholders meeting.

With respect to the proposed merger the attention of the directors was called to the specific provisions of Article VI of the proposed agreement of merger providing that such agreement may be abandoned by any of the constituent corporations at any time prior to its adoption by the stockholders of all of the Constituent Corporations, the Constituent Corporations so referred to in said agreement of merger being Mission Corporation, Pacific Western Oil Corporation and Sunray Oil Corporation.

In response to a question by Mr. Skelly as to the rights of dissenting stockholders, he was advised that stockholders did have the right to dissent under the Nevada Law and that the proxy statement being considered at this meeting incorporates the provisions of the Nevada Statutes covering the rights of dissenting stockholders.

Mr. Boal stated that the Merger Agreement was in all respects legal and that the corporation could

Plaintiff's Exhibit No. 2—(Continued)

legally submit it to its stockholders for their consideration, and that the other documents presented to the Board, or to be presented, in connection with any such proposed merger would be in proper legal form.

The president thereupon put the foregoing resolution as submitted by Mr. Skelly to vote but it was not carried, Mr. Skelly and Mr. Hyden voting for such resolution and all of the other directors voting against it. [536]

Mr. Skelly then read a statement which the President, at Mr. Skelly's request, directed be filed with the records of this meeting.

Mr. Skelly stated that he believed the producing properties of Skelly Oil Company could be sold for $160,000,000 to $185,000,000 and that the Skelly Oil Company common stock had an equivalent value of $175 to $200 per share, and requested that this statement be incorporated in the minutes.

Mr. Dockweiler, after stating to the meeting that he believed that the proposed merger under all conditions and circumstances was fair to all of the stockholders of Mission Corporation, withdrew from the meeting.

Mr. Boal then presented and read to the meeting (1) the agreement of merger, (2) the proxy statement, (3) the form of letter from the president to the stockholders, (4) the form of proxy, and (5) the form of notice of the meeting of stockholders to be held in Reno, Nevada, on December 6, 1947.

Plaintiff's Exhibit No. 2—(Continued)

The reading of these documents was frequently interrupted by questions asked by various directors concerning certain of their provisions.

Mr. Skelly then proposed the following resolution which was seconded by Mr. Hyden:

> Whereas, It appears that the proposed merger agreement between Pacific Western Oil Corporation, Mission Corporation and Sunray Oil Corporation and proxy statement have been prepared by Counsel for Sunray and Eastman Dillon in consultation with counsel for the Getty interests; and
>
> Whereas, Said merger agreement and proxy statement were first submitted to counsel for Mission on Friday, October 17, 1947, and it is apparent that counsel for Mission has not been afforded sufficient time to familiarize himself with all the terms and conditions of said merger agreement and proxy statement in order to advise the directors of Mission with respect to the legality of the merger, the accuracy and sufficiency of the proxy statement and the liability of the directors of Mission in connection therewith; [537]
>
> Be It Resolved, That further consideration of proposed merger be postponed until Monday, October 20th, at 10 o'clock a.m. and that the meeting do now recess until that time.

Mr. Boal stated that he had examined the merger agreement and had taken Sunray's proxy state-

Plaintiff's Exhibit No. 2—(Continued)

ment and adopted it to Mission, that he was satisfied that the merger agreement, proxy statements, president's letter, notice of meeting and the proxy were legal and proper; that the proxy statement was not in final form, that it was subject to such correction as the officers should see fit to make before final mailing to the stockholders and that this is the customary procedure in such cases.

At this point Mr. Dockweiler was recalled to the meeting.

The president thereupon put the resolution to a vote and it was lost, Mr. Skelly and Mr. Hyden voting in favor of it and all of the other directors voting in opposition.

Mr. Dockweiler then again retired from the meeting.

Mr. Boal then presented the following resolution which was seconded by Mr. Williams:

> Resolved, That the proposed plan of Reorganization of this corporation, Pacific Western Oil Corporation and Sunray Oil Corporation, involving the merger of this corporation and Pacific Western Oil Corporation with and into Sunray Oil Corporation, as presented to this meeting and ordered spread upon the minutes thereof, is hereby in all respects adopted and approved; and further
>
> Resolved, That the proposed Agreement of Merger between this Corporation and a majority of the Directors thereof, Pacific

Plaintiff's Exhibit No. 2—(Continued)

Western Oil Corporation and a majority of the Directors thereof, and Sunray Oil Corporation and a majority of Directors thereof, providing for the merger of this corporation and Pacific Western Oil Corporation with and into Sunray Oil Corporation, pursuant to Section 59 of the General Corporation Law of the State of Delaware and Section 39 of the General Corporation Law of the State of Nevada, as set forth in the Plan of Reorganization approved at this meeting, is hereby and in all respects approved; and further [538]

Resolved, That the Directors of this Corporation, or a majority of them, be and they are hereby authorized and directed to sign and enter into said Agreement of Merger under the corporate seal of this Corporation which the Secretary, or an Assistant Secretary, is hereby authorized and directed to affix and attest; and further

Resolved, That the President or any Vice-President of this Corporation is hereby authorized and directed to execute said Agreement of Merger in the name and on behalf of this Corporation and under its corporate seal affixed and attested as aforesaid; and further

Resolved, That said Agreement of Merger when so signed and entered into and sealed by and on behalf of this Corporation and a majority of its Directors, and Pacific Western Oil Corporation and a majority of its

Plaintiff's Exhibit No. 2—(Continued)

Directors, and Sunray Oil Corporation and a majority of its Directors, be submitted to the stockholders of this Corporation at a meeting thereof, which the President or any Vice President is hereby authorized and directed to call, to be held at the principal office of the Corporation in the State of Nevada, at 153 North Virginia Street, Reno, on December 6, 1947, at 10:00 o'clock in the forenoon, Pacific Standard Time, or any adjourned date, for the purpose of considering and taking action with respect to said Agreement of Merger; and further

Resolved, That the close of business on October 28, 1947, be and it is hereby fixed as the Record Date for the determination of stockholders entitled to notice of and to vote at the said special meeting of the stockholders of this Corporation and that the proper officers of this Corporation be and they are hereby authorized and directed to notify the New York Stock Exchange of the fixing of such record date; and further

Resolved, That Messrs. Emil Kluth, Fero Williams and Robert Z. Hawkins be and they hereby are requested to act as proxies, with power of substitution and revocation as to each, for such stockholders of the Corporation as desire to appoint them, or any of them, as proxy to act for them at such special meeting of stockholders; and further

Plaintiff's Exhibit No. 2—(Continued)

Resolved, That the form of notice of such meeting; the form of proxy statement to be furnished in connection with the solicitation of proxies for such meeting; the form of proxy and the form of a letter to stockholders, all as presented to this meeting be and they are hereby approved, subject to such changes therein or additions thereto, if any, as the proper officers of the Corporation may approve, such approval to be conclusively evidenced by the mailing thereof; and further

Resolved, That the proper officers of this Corporation be and they are hereby authorized and directed, at such time or times as they may deem advisable to take any and all such action and to execute and deliver any and all such documents as they may deem advisable in order to carry out the execution of the [539] Plan of Reorganization and Merger of this Corporation and Pacific Western Oil Corporation with and into Sunray Oil Corporation, as provided in said Agreement of Merger.

The President put the foregoing resolution to vote and it was adopted. Messrs. Boal, Kluth, Staples and Williams voted in favor of it and Mr. Skelly and Mr. Hyden voted in opposition. Mr. Dockweiler was not present in the meeting and did not vote on said resolution. The President thereupon declared the resolution adopted.

Mr. Dockweiler then returned to the meeting.

Plaintiff's Exhibit No. 2—(Continued)

The President announced that the next order of business was the ratification of the appointment of counsel acting for the corporation in connection with the proposed plan of reorganization and merger. Upon motion duly made by Mr. Kluth and seconded by Mr. Williams (Mr. Boal not voting thereon) it was resolved by a majority of the board as follows:

> Resolved, That the employment of Arthur M. Boal, Esquire, as attorney for Mission Corporation in connection with the proposed merger be and it hereby is ratified and approved.

Mr. Skelly asked to be recorded as voting No on the above resolution and Mr. Hyden asked to be recorded as not voting.

The President then announced that the next order of business was authorization of the addition of D. T. Staples as a signatory on the corporation's various bank accounts and safety deposit boxes. Upon motion duly made, seconded and unanimously carried, it was

> Resolved, That D. T. Staples be added as an additional signator on the respective depositary accounts and safety deposit boxes of this corporation, and that the secretary be empowered to furnish certified copies and the signature of said D. T. Staples to all such banks and deposit companies.

The attention of the board of directors was then called to the matter of the President's salary.

Plaintiff's Exhibit No. 2—(Continued)

On motion duly made and seconded the following resolution was adopted by a majority of the directors present (Mr. Staples not voting thereon):

> Resolved, That D. T. Staples, as President of Mission Corporation be paid an annual salary of $5000 per annum in monthly installments.

The President announced that the next order of business was the appointment of inspectors of election for the hereinbefore referred to meeting of stockholders to be held at Reno, Nevada, December 6, 1947. Thereupon the following resolution was adopted by a majority of the directors present:

> Resolved, That J. Kroupa, V. Tomlinson and M. Stratton be appointed inspectors of election to serve as such at the meeting of the stockholders of Mission Corporation to be held at Reno, Nevada, December 6, 1947, and that R. T. Quivey and C. B. Rhodes be appointed as alternate inspectors of election at said meeting in the event any regular inspector should be unable to serve.

Mr. Williams then presented the following resolution, which was duly seconded by Mr. Kluth and adopted by a majority of the directors:

> Resolved, That the proper officers of Skelly Oil Corporation be and they hereby are requested to permit any audits of the books of Skelly Oil Company, and specifically an audit as of August 31, 1947, by Arthur Andersen & Co. which may be required in connection

Plaintiff's Exhibit No. 2—(Continued)

with the merger of Mission Corporation, Pacific Western Oil Corporation, and Sunray Oil Corporation or any public or private financing related thereto, or in connection with any proxy material, listing applications, registration statements or other documents related thereto, and to furnish any and all other information in connection with the foregoing, which may be requested by Mission Corporation, Pacific Western Oil Corporation or Sunray Oil Corporation, including, without being limited to, a list of the customers of the excess crude production of Skelly Oil Company and the amounts of such purchases, during 1947, by the principal purchasers.

The President announced that the next order of business was an authorization to the President to order new mechanical equipment for stock records and dividend disbursing department of the corporation. Upon motion duly made, seconded and unanimously carried, the following resolution was adopted: [541]

Resolved, That the President and Secretary be authorized to consider and act as in their judgment appears to be in the best interests of Mission Corporation in ordering new mechanical equipment for the Stock Records and Dividend Disbursing Department of said corporation.

There being no further business, the meeting adjourned at 7:45 p.m. Central Standard Time.

.....,

Secretary. [542]

Plaintiff's Exhibit No. 2—(Continued)

"Dominant stockholder votes for merger which provides immediate cash payment to him at rate satisfactory to him—forces balance of stockholders to accept securities of surviving corporation at a rate negotiated for them by dominant stockholder who has no interest in fairness of such terms and who has denied members of the Board who would not accept his decision in the matter an opportunity to examine the terms and conditions of the merger because the time involved in so protecting the interests of the stockholders might adversely affect the dominant stockholder's tax position — forces stockholders who accept securities to risk the vicissitudes of the market and incur expense of marketing such shares to secure cash for their holdings—forces dissenting stockholders to resort to the intricate procedure set up by statute to get cash payment for their shares and compels them too to bear the legal and other expense of such proceedings and run the risk that the end of the period of time consumed by such proceedings the surviving corporation will be unable, because of the substantial cash payments made to the dominant stockholder for his shares to make cash payments to such dissenters."

Statement made by Mr. Skelly.

RZH

[Endorsed]: Filed Nov. 21, 1947. [543]

PLAINTIFF'S EXHIBIT No. 3

In the District Court of the United States for the Southern District of California, Central Division

Civil Action No. 7740-Y

WILLIAM G. SKELLY,

Plaintiff,

vs.

THOMAS A. J. DOCKWEILER and GEORGE FRANKLIN GETTY II, etc., et al.,

Defendants.

DEPOSITION OF
THOMAS A. J. DOCKWEILER

a Defendant in the Above-Entitled Action, Taken at 9:45 a.m. on Saturday, November 15, 1947, at Los Angeles, California.

Appearances of Counsel: (See Title Page.)

W. L. Heathcote, Official Court Reporter, Deposition Notary, 108 West Second St., Los Angeles 12, Calif. MUtual 1116. Reported by: Robert H. Clark, Laura Breska. [544]

Plaintiff's Exhibit No. 3—(Continued)

In the United States District Court for the District of Nevada

Civil Action No. 669

WILLIAM G. SKELLY,

Plaintiff,

vs.

MISSION CORPORATION, a Corporation,

Defendant.

NOTICE TO TAKE ORAL DEPOSITIONS

To Mission Corporation, a corporation, the Defendant:

Please take notice that by order of the Honorable Judge Roger T. Foley, Judge of the District Court of the United States for the District of Nevada, dated the 4th day of November, 1947, the plaintiff in the above entitled action will take the depositions of Thomas A. J. Dockweiler, whose address is 1035 Van Nuys Building, 7th and Spring Streets, Los Angeles, California, and the deposition of George F. Getty II, whose address is 2355 Adair Street, San Marino, California, and the deposition J. Paul Getty, whose address is Room 424 Junipher Building, Santa Monica, California, upon oral examination pursuant to the Federal Rules of Civil Procedure, as amended, at Room 631 Van Nuys Building, 210 West Seventh Street, in the City of Los Angeles, State of California, at 10 o'clock a.m. in

Plaintiff's Exhibit No. 3—(Continued)

the forenoon of the 15th day of November, 1947, and said examination will proceed from day to day until completed.

Dated this 4th day of November, 1947.

/s/ JOHN P. THATCHER
WM. WOODBURN
HAROLD C. STUART
THEODORE RINEHART
VILLARD MARTIN
GARRETT LOGAN
Attorneys for Plaintiff

Service of the above notice admitted this..... day of November, 1947.

MISSION CORPORATION,
A Corporation,
By .....

[Title of District Court and Cause.]

AFFIDAVIT OF SERVICE

State of Nevada,
County of Washoe—ss.

Catherine Tweedt, being first duly sworn, deposes and says:

That she is a resident of Reno, Washoe County, Nevada, and over the age of twenty-one years. That on the 4th day of November, 1947, at the hour of 3:25 p.m. of said day, she delivered to one Bryce Rhodes, at the principal office of Mission Corpora-

Plaintiff's Exhibit No. 3—(Continued)

tion in the State of Nevada, to wit, 153 North Virginia Street, Room 19, Stack Building, in said city, a copy of the within notice, there being no officer or agent of Mission Corporation present at said office at said time, and that the said Bryce Rhodes was at said time and place in charge of the principal office of Mission Corporation.

CATHERINE TWEEDT.

Subscribed and sworn to before me this 4th day of November, 1947.

[Seal] WM. WOODBURN,

Notary Public in and for the County of Washoe, State of Nevada.

[Endorsed]: Filed Nov. 6, 1947.

In the United States District Court for the District of Nevada

Civil Action No. 669

WILLIAM G. SKELLY,

Plaintiff,

vs.

MISSION CORPORATION, a Corporation,

Defendant.

The depositions of Thomas A. J. Dockweiler, of 1035 Van Nuys Building, 7th and Spring Streets, City of Los Angeles, State of California, and George Franklin Getty II, of 2355 Adair Street,

Plaintiff's Exhibit No. 3—(Continued)

San Marino, State of California, were taken before me, a notary public in and for the County of Los Angeles, State of California, on the 15th day of November, 1947, at Room 631 Van Nuys Building, 210 West Seventh Street, in the City of Los Angeles, in the County of Los Angeles, State of California, pursuant to the annexed notice, on behalf of the plaintiff in the above-entitled action pending in the above-named court. Villard Martin, Esq., Garrett Logan, Esq., Theodore Rinehart, Esq., and Harold C. Stuart, Esq., of the City of Tulsa, State of Oklahoma, appeared as attorneys for the plaintiff, and Arthur M. Boal, Esq., of the City of New York, State of New York, Lester D. Summerfield, Esq., and Robert C. Hawkins, Esq., of the City of Reno, State of Nevada, appeared as attorneys for the defendant. [545]

Mr. Logan: I may show for the record that the following appear for the plaintiff:

Mr. Howard Wright, Mr. Villard Martin, Mr. Garrett Logan, Mr. Theodore R. Rinehart, and Mr. Harold C. Stuart, in case No. 7740-Y Civil, in the United States District Court for the Southern District of California, Central Division, and that all of the above named, except Mr. Wright, appear on behalf of the plaintiff in case No. 669 Civil, in the United States District Court for the District of Nevada.

I do not know the appearances for the defendants.

Mr. Sterry: I suggest that one of the notaries went around and took the appearances down, and

Plaintiff's Exhibit No. 3—(Continued)

I believe has them. May the record show that their appearances may be typed out, without taking the time of the appearances being repeated? Those are all in the Los Angeles case.

I think my understanding is that there is no party to the Nevada suit except the Mission Corporation. Therefore, of course, the counsel appearing for the parties in the suit pending in the District Court here would not properly appear for the parties there in the Nevada suit, but that is because they are not parties in that suit.

Mr. Rinehart: Who is the gentleman on your right?

Mr. Sterry: Mr. Hecht. That brings up another question, gentlemen. I haven't seen your papers, but I understand you gave notice to take the deposition of Mr. Thomas Dockweiler and Mr. George Getty II, as trustees, [546] in the suit pending in the District Court of California, and also consider them as witnesses to give a deposition in the suit pending in the State of Nevada.

Now, I assume probably that you want to ask practically the same questions, and can it be understood that any question asked—I suggest that the notary write out two originals, and that they be filed one in each suit. I don't assume you want to go through the form of taking two depositions at the same time; isn't that correct?

Mr. Logan: I think that is correct. If you will permit, I will make one more suggestion, that we might agree that the original of the deposition

Plaintiff's Exhibit No. 3—(Continued)

be filed in the Nevada case, and that the first copy be executed by the Notary and signed by the witness, and be filed in the California case. I don't insist on that, but we will save a lot of transcript.

Mr. Sterry: It is all right with me if you can get by the court, and if the court will accept it. I think there is a rule, however, that I am not too familiar with.

Mr. Dockweiler: There is a rule requiring it to be a first impression.

Mr. Sterry: That is a local rule, as I understand it, that the first impression be filed. As far as the parties are concerned, it will be all right, if you want to take that chance and get an order from the court. I think you can get an order from the court. [547]

Mr. Logan: In that case we can have two originals.

Mr. Sterry: I think you can get an order from the court. The local rule requires a first impression, and in view of that rule you might be in difficulty. It is your deposition and you can take it any way you want.

Can we have this understanding, of course, that as the deposition progresses there might be observations, questions asked, and objections made by counsel for parties to the suit in the California District Court, and they are not appearing in the Nevada suit, but that, because of convenience, the depositions may be considered in both suits, and

Plaintiff's Exhibit No. 3—(Continued)

that no such observations, objections, or questions shall be deemed to constitute any appearance by any of such parties represented by such counsel in the Nevada suit?

Mr. Logan: That is true.

Mr. Sterry: I don't think it would be, but that is a practical proposition.

Mr. Farrand: It is not only agreeable, but I want it clearly understood that as the representative for Mr. George Franklin Getty II, as co-trustee, that our appearance here is not an appearance, and does not make an appearance, in the Nevada suit.

Mr. Logan: The plaintiff will stipulate that all parties present and their counsel—that the plaintiff will not assert in the Nevada case that what transpires here [548] today in the taking of what might be termed a joint deposition in the two cases will constitute any appearance of the defendants in the California case, who are not parties to the Nevada case, and will not constitute their entry of appearance in the Nevada case.

Mr. Boal: May it be also understood that the Mission Corporation is not appearing in the California case?

Mr. Logan: That is right. I would say it this way: As a matter of convenience for all parties, we are taking the depositions on common question and answer to be used in each case, but that for all jurisdictional purposes these depositions are separately taken.

Plaintiff's Exhibit No. 3—(Continued)

Mr. Sterry: And do not constitute an appearance in either case for the defendants in the other case, who are not in that case.

Mr. Logan: That is entirely agreeable.

There is one other point. We are ten minutes early on our time for the taking of the deposition, or the commencement of the deposition in the Nevada case. That was noticed for ten o'clock.

Mr. Sterry: It will be taken jointly, so time will be waived.

Mr. Logan: So stipulated between all parties?

(No objection was made by any counsel.)

Mr. Sterry: To save time, any question asked or objection made by counsel for any of the parties in the [549] California suit may be deemed as made by all of them, unless counsel for one of the parties expressly declined to be represented by that objection, and that any such question or objection made by any of the California appearances may, in view of the joint deposition, be considered as made on behalf of the Mission Corporation, in that suit; likewise, any objection made or statement asked by Mission counsel may be considered as made on behalf of the parties in the California suit.

Mr. Logan: That is agreeable.

Plaintiff's Exhibit No. 3—(Continued)

Deposition of

THOMAS A. J. DOCKWEILER

called as a witness by the plaintiff herein, having been first duly sworn, deposed and testified as follows:

Direct Examination

By Mr. Logan:

Q. Please state your name.

A. Thomas A. J. Dockweiler.

Q. Your age, residence, and occupation or profession?

A. 55 years old; 27 St. James Park, Los Angeles, California; attorney and counsellor at law.

Q. How long have you been engaged in the practice of law? [550] A. Since May, 1915.

Q. Did you know George F. Getty during his lifetime? A. I did.

Q. What, briefly, were your business or professional relationships with him?

A. I had no professional relationship with him in the sense of ever representing him as counsel. He was represented, so far as I know, by Rush Blodgett. However, I had contact with him in matters pertaining to the oil business and his own business.

Q. Over what periods of time was this?

A. It would be hard to say; some years in the twenties, I think.

Q. Did you know Sarah C. Getty during her lifetime? A. I did.

Plaintiff's Exhibit No. 3—(Continued)

(Deposition of Thomas A. J. Dockweiler.)

Q. What was your business or professional relationship with her, if any?

A. Part of the time I acted as her counsel, with the consent of her regular counsel, Rush Blodgett. Rush Blodgett had been counsel for Mr. and Mrs. George F. Getty, and continued to advise Mrs. Getty after George F. Getty died.

After Mr. Blodgett, as I recall, left or gave up the general counsellorship of George F. Getty, Incorporated, Mr. George F. Getty's corporation, and devoted himself to other business, he didn't have as much time, or probably as much inclination, I assume, and from time to time I acted as [551] counsel for Mrs. Getty.

Q. Did you or your firm act as attorneys in the probate of the estate of Sarah C. Getty?

A. Yes.

Q. How long have you known J. Paul Getty?

A. Oh, I should say since the early twenties.

Q. Again, briefly, what have your business and professional relationships been with him?

A. I have been his counsel since that time.

Q. Do you know George Franklin Getty II?

A. I do.

Q. What, if any, relation is he to J. Paul Getty?

A. The eldest son.

Q. Was J. Paul Getty the original trustee under a declaration of trust wherein Sarah C. Getty was trustor, dated December 31, 1934? A. Yes.

Plaintiff's Exhibit No. 3—(Continued)
(Deposition of Thomas A. J. Dockweiler.)

Q. When, if at all, did he cease to be such trustee? A. September, 1941.

Q. Who are the present trustee or trustees of the trust?

A. George F. Getty, as eldest son, and myself.

Q. On what date did you become trustee?

A. About the middle of September, 1941, upon Mr. Getty's resignation.

Q. In other words, you succeeded him?

A. I succeeded Mr. Getty. [552]

Q. By whom or in what manner was your appointment made?

A. Pursuant to the terms of the trust declaration by Mr. Getty's appointment, recorded in the office of the County Recorder of this county.

Q. When you say Mr. Getty, do you mean Mr.—

A. Mr. J. Paul Getty.

Q. By whom and/or in what manner was Mr. George Franklin Getty II appointed?

A. The instrument of appointment of successors of trustee of record recorded in the office of the county recorder, Los Angeles County, California, provided for a succession of named trustees, and also provided that when George F. Getty II attained the age of 22 years he would become trustee, and makes provision for the appointment for the succession to the trusteeship as co-trustee, with any of the trustee or trustees then acting, of each of the sons of Mr. Getty when he attained the age of 21 years, other than George F. Getty II,

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whose appointment as trustee was effective upon his attaining the age of 22 years.

Q. Who are the beneficiaries of that trust?

A. Mr. Getty—that is, Mr. J. Paul Getty—his sons, George Franklin Getty II, Jean Ronald Getty, Eugene Paul Getty, Gordon Peter Getty, Timothy Christopher Getty, and such other child or children who may be born to Mr. Getty: the lawful issue of any deceased child of Mr. Getty; the lawful issue of Mr. Getty, who may survive the [553] termination of the trust, and as a contingent and final vestee of the principal of the trust.

In the event that, at the time of the termination of the trust, Mr. J. Paul Getty is not then survived by lawful issue, the Museum Associates, a California non-profit corporation.

Q. I judge there is no possible reverter in that trust?

A. No possible reverter under any circumstances.

Q. Do you and George Franklin Getty II, as trustees under this trust, own any shares of the capital stock of the Pacific Western Oil Corporation? A. Yes.

Q. How many? A. 699,422.

Q. If you know, does Mr. J. Paul Getty own any shares of the capital stock of that corporation?

A. Yes, he owns—may I be refreshed?

Q. Yes.

A. ——499,021, that is, in his individual capacity, and as testamentary trustee under the last

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will of his mother, Sarah C. Getty, deceased. I think that covers it.

Q. If you know, how many shares of capital stock did Pacific Western Oil Corporation have issued and outstanding?

A. Rather than speak from memory, I would prefer to be refreshed.

Q. Mr. Dockweiler, does this refresh your recollection: [554] that exclusive of shares in the treasury, the total outstanding stock of Pacific Western consists of 1,371,730 shares?

Mr. Boal: That is correct.

A. That is correct.

Q. (By Mr. Logan): Do the stockholders of Pacific Western Oil Corporation meet annually?

A. Yes.

Q. And at that annual meeting are its directors elected? A. Yes.

Q. When was the last time you had an annual meeting?

A. In April. I don't remember the exact date.

Mr. Boal: 17th:

The Witness: April 17th last.

Q. (By Mr. Logan): At that meeting was the stock owned by you and George Franklin Getty II voted for the election of the directors?

A. The stock now owned by me and George Franklin Getty II was voted by me as trustee by proxy. At that time the stock had not yet been transferred of record into the joint names of the

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two present trustees, but stood in my name as trustee of the Sarah C. Getty trust, and when I refer to the Sarah C. Getty trust I mean the trust that was created originally by the declaration of December 31, 1934, to which you have already referred.

Q. As distinguished from the testamentary trust? [555]

A. As distinguished from the testamentary trust.

Q. Then the answer is that the stock was voted for the election of directors at that meeting?

A. That is correct.

Q. Was the stock owned by Mr. J. Paul Getty voted for the election of directors at that meeting?

A. I can't speak personally, but I understand that it was. I was not present at the meeting.

Mr. Sterry: The answers to the interrogatories which were proposed will show that the individual stock owned by him and his trustees was voted for him by proxy. That is my understanding.

The Witness: That is my understanding, too, from what I have heard.

Q. (By Mr. Logan): Will you please name the directors of Pacific Western Oil Corporation that were elected at the last stockholders' meeting?

A. I had better refresh my memory from the—

Mr. Boal: Do you want the minutes (handing document to the witness)?

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The Witness: Ruloff E. Cutten, R-u-l-o-f-f E. C-u-t-t-e-n; Lloyd S. Gilmour, G-i-l-m-o-u-r; Edward Groth, G-r-o-t-h; Frank A. Paget, and D. T. Staples.

Q. (By Mr. Logan): And that, I believe you said, was in April of this year?

A. April 17th of this year. [556]

Q. Is Mr. Cutten still a member of the board?

A. Yes.

Q. Is Mr. Gilmour still a member of the board?

A. I understand not, that he has resigned.

Q. If you know, who was elected to take his place?

A. I believe Mr. Fero Williams was elected on October 20, 1947.

Q. If you know, when did Mr. Gilmour resign?

A. That I don't know, but I believe prior to October 20, 1947.

Q. Is Mr. Groth still a member of the board?

A. He is still a member of the board.

Q. And Mr. Paget? A. Yes.

Q. And Mr. Staples? A. Yes.

Q. Please tell me who are the officers of Pacific Oil Corporation, and the office which each of them holds.

A. Do you have any objection to my refreshing my memory?

Q. No, sir, not at all.

A. Mr. D. T. Staples is president of the corporation. Mr. Emil Kluth is vice-president. Mr. Charles F. Krug, Jr., is secretary.

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If I slip up, you gentlemen correct me, because I am speaking from memory. [557]

Mr. Evans is a vice-president; Mr. Fero Williams is assistant treasurer and assistant secretary; and the treasurer is——

Mr. Hecht: I think Mr. Krug is secretary and treasurer.

The Witness: Secretary and treasurer?

Mr. Hecht: I believe so.

The Witness: That is my remembrance of it.

Q. (By Mr. Logan): In what manner are the officers or directors of Pacific Western Corporation elected or chosen?

A. By the board of directors.

Q. What is Mr. Staples' salary at present?

Mr. Hecht: $22,500 a year.

The Witness: That is exclusive of any other compensation.

Mr. Hecht: That is his salary as president of Pacific Western.

Mr. Logan: Let me limit the question, then.

Q. What is Mr. Staples' salary at present as president of Pacific Western Oil Corporation?

A. $22,500, as I understand.

Q. Does that figure represent any increase in the salary of Pacific Western Oil Corporation during the last twelve months?

A. It represents an increase, but I don't remember whether that increase is within the last twelve months. [558]

Plaintiff's Exhibit No. 3—(Continued)
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Q. If you know, what is Mr. Kluth's salary as vice-president of Pacific Western?

A. That I don't know.

Q. Do you know the salaries of any of the other officers?

A. I do not. I don't remember. I might explain, I am neither an officer nor a director of Pacific Western.

Q. I understand.

You do own a majority of its stock, though, do you not, as trustee?

A. Yes; but the salaries, when I last saw the salary list, looked reasonable to me, and that was all I had to know, and I make no attempt to keep my memory charged with figures of that kind.

Q. When did you last look at the salaries, Mr. Dockweiler?

A. I probably was told of the salaries whenever there was a substantial raise made in any of the top officers. I may not have been. But, I think I last looked into the matter or last had the matter brought to my attention or gave it attention a number of months ago, in all probability prior to this April meeting of the board.

Q. Does each of the officers you have named devote his full time to the affairs of Pacific Western Oil Corporation?

A. Some time is devoted to the affairs of the Mission [559] Corporation by such of those officers who are also officers of Mission Corporation. Some

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of those officers who are on the Board of Directors of the Skelly Oil Company devote time to the Skelly Oil Company. But, generally speaking, all of those men are full time officers and employees of Pacific Western Oil Corporation.

Q. To be a little more specific, then, Mr. Staples currently devotes a portion of his time to the affairs of Mission? A. That is true?

Q. And as to Mr. Kluth the same is true?

A. Yes.

Q. And as to Mr. Williams the same is true?

A. That is true.

Q. Are any of them directors of the Skelly Oil Corporation? You say Mr. Staples is.

A. Staples is now.

Q. Mr. Kluth?

A. Mr. Kluth and Mr. Williams and Mr. Evans.

Q. Outside of time devoted to the affairs of the corporation that you have mentioned, does Mr. Staples devote his time to any other business or occupation or profession?

A. The only occupation that I know that Mr. Staples himself has is his connection with and work for the Pacific Western Oil Corporation, Mission Corporation, and now [560] Skelly Oil Company.

Q. Is that true of the other officers generally?

A. Yes. As I say, they are full time officers and employees.

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Q. Do any of the officers or directors of Pacific Western Corporation have any options or rights to purchase its stock?

A. Of Pacific Western, yes. There is an option plan involving a few shares of stock, comparatively speaking. I cannot give you the details of the plan offhand, but there is that plan. It does not involve very much money. I approved it when it was adopted, but that is a number of months ago.

Q. I hope you will pardon me a minute, Mr. Dockweiler because I have to refresh my memory.

Is it correct that under the date of December 21, 1946, Pacific Western offered to certain of its employees options to purchase between January 15th and February 1st, 1948, an aggregate of 4,477 shares of its capital stock at the price of $20 per share, payment to be through authorized semi-monthly payroll deductions, and that pursuant to such offer Mr. Staples, Mr. Kluth and Mr. Williams indicated to Pacific Western that they might desire to purchase respectively 150 shares, 100 shares, and 93 shares?

A. Are you reading now from the proxy statement of Mission Corporation? [561]

Q. That is correct.

A. That's correct.

Mr. Boal: Will you note the page, Mr. Logan, you are reading from?

Mr. Logan: I did not read it literally, Mr. Boal.

The Witness: You gave me the substance of what is on that page.

Plaintiff's Exhibit No. 3—(Continued)
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Mr. Logan: I was getting my information from page 26 of the proxy statement.

Mr. Sterry: Counsel, we have been taking half an hour asking questions about which you know perfectly, and about which there is no dispute, all of which is set forth in the registration statements and the various documents that have been issued in connection with this merger, including the various proxy statements sent out.

Now, why on earth can't we stipulate, as far as my clients are concerned, that you can use and present to the court any facts in any of those documents, and they are true? What is the use of taking up a lot of time and running up tremendous expense to the parties asking questions about things that are perfectly a matter of record, and you know about it, and there cannot be any dispute about it?

Mr. Logan: All I can say is, Mr. Sterry, if we had stipulations on these matters I would not be asking these questions, but unless and until we have stipulations I am sure you will agree with me that I should be at liberty to [562] proceed with the case.

Mr. Sterry: I cannot stop you asking questions, but, as far as I am concerned, I am perfectly willing to stipulate that you may either put in evidence or use at any hearing the notice of meeting and the proxy statement of a special meeting of the Mission Corporation stockholders to be held December 6, 1947, and all the facts there that you have been inquiring about are there as a matter of record. There cannot be any dispute about them.

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I believe counsel for all other parties will join me in that.

Mr. Boal: Counsel for Mission Corporation has no objection to your offering the proxy statement in evidence in the Nevada action.

Mr. Summerfield: So stipulated.

Mr. Logan: Could we have some copies? We have only one.

Mr. Boal: We will get some copies.

Mr. Sterry: Do you see any objection to that, Mr. Farrand?

Mr. Farrand: The trustee George Getty sees no objection to its being offered. As to its contents, neither our client nor ourselves have any knowledge as to its accuracy or completeness.

Mr. Logan: Then you will not stipulate along the lines suggested, that whatever is contained in that statement [563] may be received in evidence as a fact in lieu of developing the fact in some other manner?

Mr. Hecht: Subject to its relevancy and materiality.

Mr. Logan: All right.

Mr. Farrand: Subject to its relevancy and its materiality and its competency, we have no objection to its being offered. As to its contents and as to a stipulation that it is true, we are not advised and did not prepare it, and cannot stipulate to it.

Mr. Logan: Very well, sir. I think that answers our situation.

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Mr. Farrand: I think I saw it just the last two or three days, but it is a voluminous document, and we cannot stipulate to its being true or incorrect. We have no reason to doubt it, but we don't know about it.

Mr. Hecht: Mr. Farrand, can't you stipulate that it be taken as true in the action, without conceding the truth for any other purpose; matters of record, and books, and so forth?

Mr. Farrand: Your proposition now is what, Mr. Hecht?

Mr. Hecht: That you stipulate that it be taken as true in the action without admitting its truth or conceding its truth for any other purpose.

Mr. Farrand: We think that the deposition should develop in its orderly fashion. The contents of it we are not acquainted with. It would seem to me that [564] counsel certainly could find out, however, without all of this delay, what salaries were paid to people and who they are by some simpler device than asking a man who does not remember some of them and has to refer to records which are already here.

Q. (By Mr. Logan): Reverting back to the election of the directors of Pacific Western last April, Mr. Dockweiler, you voted your stock for the election of the directors that you have named?

A. By proxy, yes.

Q. You are, of course, familiar with the proposed plan of merger of Pacific Western into some other corporations? A. Yes.

Plaintiff's Exhibit No. 3—(Continued)
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Q. If that merger becomes effective, if you know, what disposition is to be made of the shares of stock that you have been subscribed for or offered to be bought by Mr. Staples, Kluth and Williams, to which I just recently referred?

A. My understanding is that those who have subscribed for those shares are to be protected in them. In other words, it is my understanding they are to be permitted to pay up the purchase price, and those shares that they so have will be paid for in cash if they elect to take cash for them, at the same rate at which the shares of Mr. J. Paul Getty and the trustees will be paid for, $68 a share.

Q. Do you know the purchase price to be paid by the [565] officers for that stock per share?

A. I think that is $20. I think that was based upon the relationship to market price at the time the agreement was entered into in December of 1946.

Q. Have you and Mr. George Franklin Getty II, as trustees, and Mr. J. Paul Getty, individually and as trustee under the testamentary trust, entered into a written contract relative to the sale of all the stock that you own in Pacific Western Oil Corporation? A. Yes.

Q. Do you have a copy of that agreement with you? A. Not here, no.

Mr. Sterry: Can't we stipulate that marked copy has been attached to your answer at this point?

Plaintiff's Exhibit No. 3—(Continued)
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Mr. Logan: May it be stipulated, gentlemen, that Exhibit "A" to the bills of complaint is a correct copy of that agreement?

Mr. Sterry: There is an amendment to that.

Mr. Logan: I am not asking you about the amendment now. I am perfectly willing to get into it. But, may it be stipulated that Exhibit "A" to each of the complaints is a correct copy of the original agreement?

Mr. Sterry: I will so stipulate.

Mr. Boal: Mission so stipulates.

Mr. Farrand: We will stipulate, subject to check. We haven't compared it. [566]

Mr. Dockweiler: I will stipulate.

Q. (By Mr. Logan): Does the first paragraph of that agreement, beginning with the words, "Whereas Sunray is," and so forth, correctly set forth stock ownership and total outstanding issued stock of the various corporations named in that paragraph?

Mr. Sterry: May I have that question, Miss Reporter?

(The question was read by the reporter.)

Mr. Farrand: We don't find any such recital in the place where the question was asked.

Mr. Logan: The paragraph begins with the language, "Whereas" the trustees and Getty are the owners and record holders of—and then there is a recital of ownership of shares and outstanding stock of Pacific Western, with Mission and Skelly Oil Company.

Plaintiff's Exhibit No. 3—(Continued)
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The Witness: According to the best of my recollection, that so states the holdings and issuance of shares that are outstanding.

Q. (By Mr. Logan): Now, Mr. Dockweiler, I assume that when you negotiated that contract you deemed it to be your duty as trustee to get the best price you could get for the stock?

A. Certainly.

Q. And you did that?

A. I believe we did.

Q. Who first mentioned to you the possibility of [567] selling this stock to Sunray Oil Corporation? A. Mr. J. Paul Getty.

Q. When, please? Approximately; I know you can't recall the exact date.

A. To Sunray directly it would probably be some time in August.

Q. August, 1947, I take it?

A. August, 1947.

Q. Where was that suggestion made to you?

A. Oh, in a phone conversation I had with him. I was here.

Q. And where was he?

A. He may have been in Santa Monica; he may have been out of town, that is, in Tulsa.

Q. What did he say?

A. Well, just in general conversation he said—he mentioned the fact that a suggestion had been made that—or that Sunray would be willing to buy the stock for $68 a share. I have no recollection of

Plaintiff's Exhibit No. 3—(Continued)
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the exact language used, because there had already been considerable discussion in preceding months on a deal at $68 a share for the stock. However, that deal was not the deal that was ultimately expressed in the agreement of October 4, 1947.

Q. When did you next talk to anyone further about the matter?

A. I can't say when I next talked to anyone about that. [568] Because there were a number of conferences held with interested parties right down to the time that the agreement was executed in October. It wasn't one or two or three or four conversations. The matter was under rather general and constant discussion. I spoke to Mr. Getty, my co-trustee, on the subject of that proposed sale to Sunray.

Q. When did you do that?

A. Oh, a number of times. I would no more attempt to remember the precise dates—this was not a matter of one or two conversations, gentlemen; this was a matter that had been considered by myself and those interested, I think over a period of many weeks, and I am accustomed frequently to hearing from Mr. Getty, Sr., and I make no attempt to charge my mind with the content of each of those conversations, some short and some long. But, I spoke of the subject of this sale with Mr. George F. Getty, my co-trustee, I spoke of it to his counsel, Mr. George E. Farrand, I spoke of it to Mr. Lloyd Gilmour, to Mr. Petigrue of the firm representing

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Sunray—the law firm representing Sunray, Breed, Abbott & Morgan—I spoke of it to Mr. David Hecht and Mr. Norman Sterry and Mr. Henry Prince of Gibson, Dunn & Crutcher, representing Mr. Getty in the matter. In fact, there were many conversations on the subject.

Q. You say you speak to Mr. Gilmour about the transaction. [569] Did you speak to him more than once about it?

A. Yes. How many times I wouldn't' be able to remember.

Q. But several times? A. Oh, yes.

Q. Without trying to remember any details of the conversation, can you indicate to me how much time you spent with Mr. Gilmour on this thing?

A. Well, with Mr. Gilmour personally, maybe it would total into some hours. That is about all I can say.

Q. And Mr. Petigrue.

A. Again, I would say a number of hours.

Q. On several different occasions?

A. Oh, yes. This is the aggregate, you understand, of the conferences.

Q. Yes. I understand. And, with Mr. J. Paul Getty, was the same true?

A. I think quite often. The time consumed, I think, would be considerable.

Q. And Mr. George Franklin Getty II?

A. Yes. Not as much. I think probably I had as much conversation with his counsel as I had with him personally.

Plaintiff's Exhibit No. 3—(Continued)
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Q. And Mr. Hecht, did you talk to him at considerable length about the matter?

A. Well, at how much length I don't know. I don't [570] think so. I had a number of conferences with him, but I believe they were comparatively brief until we were just about to the point of signing an agreement, and then I had a number of conferences with him.

Q. Mr. Hecht is the attorney or one of the attorneys for Mr. J. Paul Getty?

A. In this transaction he is representing him.

Q. Whom did Mr. Sterry represent?

A. Mr. Getty.

Q. And the same thing would be true of Mr. Prince, then? A. Yes.

Q. Were you desirous of making the sale?

A. I thought it was of sufficient benefit to the trust to make it.

Q. Was Mr. J. Paul Getty desirous of making the sale? A. He was.

Q. In addition to those that you have named, did you confer or consult with any other persons about this sale?

A. You are speaking about the sale directly to Sunray Oil Corporation?

Q. I am speaking now, Mr. Dockweiler, about the negotiations leading up to the execution of the contract of October 4, 1947.

A. Well, the only other person that I can recall with whom I have had any discussion on the subject

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was Mr. E. A. Parkford. Now, possibly if some other person [571] would come to mind—Oh, Mr. Ross Fisher I believe I spoke to. I think I spoke to the two Mr. Farrands, Mr. George Farrand and his son, I think, in conversation in their office. I have spoken to the officers of Pacific Western.

Q. When?

A. Oh, a number of times. I would say many times.

Q. When?

A. Well, many times, beginning from the time that the proposition was made in August, right down to October 4th and beyond. That would be Mr. Staples, Mr. Kluth, Mr. Williams, and I think Mr. Evans.

Q. Is that all?

A. Prior to the signing of that contract, I think that would probably cover the list. I cannot say that it is exclusive of the possibility of one or more other persons to whom I may have spoken, because the matter was quite freely discussed.

Q. How much time would you estimate you devoted in discussing the matter with Mr. Staples?

A. Oh, I might mention I spoke about it to Mr. Skelly, this $68 deal, and I spoke to Mr. Hyden.

Q. Now, how much time do you estimate you spent in discussing the matter with Mr. Staples?

A. That would be wholly impossible, and I don't want to make a guess; wholly impossible. I could say I spent [572] hours.

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Q. Is that same thing true as to the other officers of Pacific Western?

A. It would be true as to Mr. Fero Williams, in a lesser degree with Mr. Kluth. The conferences, one or more, possibly, with Mr. Evans, would be very brief comparatively. He may have been present, you see, at conversations; maybe longer.

Q. Was that contract to which I have referred actually executed on the day it bears date?

A. It was. That was a Saturday.

Q. By all the parties to it on the same day?

A. All the parties to it, in Mr. George E. Farrand's office.

Q. Here in Los Angeles? A. Yes.

Q. Who drafted the contract?

A. When I say it was executed, Mr. Getty did not sign it in his (Mr. Farrand's) office. Mr. Getty had already signed it, and it was brought down to the office. Mr. Getty wasn't present.

Q. Which Mr. Getty, please?

A. Mr. J. Paul.

Q. If you know, who drew the contract?

A. Frankly, I don't know. It was presented to me for examination, and I found it satisfactory.

Q. Who presented it to you, Mr. Dockweiler?

A. Now, that I don't remember. I think it was probably either Mr. Hecht or Mr. Sterry. I don't remember.

Q. As I understand it, you had nothing to do with this contract until it was presented to you for signature?

Plaintiff's Exhibit No. 3—(Continued)
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A. Oh, the terms had been discussed, but the mechanical work of drafting the contract was immaterial to me, who was to do it; in fact, I would just as soon have somebody else do it. In other words, it didn't come to me as a surprise when I saw the contract.

Q. Its terms had been discussed before?

A. Its terms had been discussed.

Q. Who suggested the clause in the contract that the holders of shares of Pacific other than the trustees and Getty also be given an opportunity to sell their shares to Sunray at $68 a share cash?

A. That was suggested by the trustees.

Q. You mean, yourself and Mr. Getty?

A. And Mr. Getty; and I believe also by Mr. J. Paul Getty. The three of us thought that should be in there.

Q. Why?

A. We were the controlling stockholders of Pacific Western by an overwhelming majority, and we felt that every Pacific Western stockholder, the remaining fourteen and a fraction per cent, should be given the same opportunities that we had to sell, and we thought we were [574] doing our duty to the immediate stock corporation in which we were holding stock in so requiring that payment to be made.

Q. Immediately before the "In Witness Whereof" clause of this contract, Mr. Dockweiler, there is a paragraph (d); it is 5(d).

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Without trying to quote it to you exactly, that envisions Sunray's obligation to purchase the Pacific shares on the fact that there would be no substantial adverse changes in the financial condition of Pacific, Mission, and Skelly?

A. That, of course, was one that Sunray insisted on putting in. It was immaterial to us whether it was put in or not.

Q. I assume it was likewise immaterial to you as to what might be the changes in the financial conditions of Sunray?

A. Yes; because they were purchasing it. In other words, these clauses that were put in were protective of them. We would have been satisfied with a direct agreement of Sunray to purchase from us without any conditions.

Q. If this contract of October 4th for the purchase of the stock is carried out and all of the stockholders of Pacific Western should tender their stock for cash, there will be required a cash outlay of somewhat over [575] $93,000,000, will there not?

A. That is correct.

Q. During the negotiations that led up to the execution of this contract, did you have any discussion with anyone as to how that cash was to be raised?

A. When you speak about discussion, that is one thing; when you speak about being told or informed, or learning or hearing, the possibility is I was, yes. I think Mr. Lloyd Gilmour, Mr. Hecht, may have

Plaintiff's Exhibit No. 3—(Continued)
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spoken of the subject to me. Those details I frankly don't remember, but there was discussion or explanation as to how this money would be raised.

Q. I take it that you know that at the time you executed this contract Sunray did not have ninety-three odd million dollars in its treasury?

A. Well, frankly, I assumed it had not. That would be quite a large current position.

Q. Were you at all interested in whether or not Sunray might be able to raise the amount of money to carry out the contract?

A. If they couldn't raise the amount of money, if they couldn't carry out the contract. I certainly was interested.

Q. Did you endeavor to learn how they proposed to do it?

A. Well, I was told in a general way how it was proposed to be done, and as long as we were satisfied that there was a prospect of the money being raised, I thought it was sufficient reason for entering into the contract. If there had been no prospect of the money being raised, why, obviously, I would not have entered into the contract.

Q. What did you understand to be the method by which the money was to be raised?

A. Borrowings, capital issues.

Q. Is that all?

A. Sale of Tide Water stock.

Q. Owned by what companies?

A. The Tide Water stock would become the property of Sunray after the merger had been

Plaintiff's Exhibit No. 3—(Continued)
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effected. It might have involved borrowing prior to the actual sale of the Tide Water stock being consummated. It might have called for at least a contractual arrangement.

Q. Yes; but by whom is that stock presently owned?

A. That stock is presently owned by Pacific Western Oil Corporation and by Mission Corporation.

Q. Did you understand it to be a part of the arrangement that there would be a merger of corporations involved so that the cash could be raised?

A. Well, I understood that it would have been impossible to have gone through with the deal unless there were a merger. Yes, it is mentioned right in our agreement. [577]

Q. Mr. Dockweiler, after the execution of this contract of October 4th, did you leave Los Angeles?

A. Yes. I went down to Tulsa, and arrived there on the 11th.

Q. Did you go directly from here to Tulsa?

A. Yes.

Q. About what time did you leave?

A. Oh, I left here—I think it was Thursday, the 9th, on the Grand Canyon Limited. I got into Tulsa Saturday afternoon on the 11th.

Q. Did anyone go with you? A. No.

Q. You went by yourself? A. Yes.

Q. Who did go with you, Mr Dockweiler?

A. Nobody except myself. In other words, I went alone.

Plaintiff's Exhibit No. 3—(Continued)

(Deposition of Thomas A. J. Dockweiler.)

Q. I notice, of course, that the contract mentions a merger of four companies. Was it later decided to eliminate one of them and proceed with a three-company merger? A. Yes.

Q. Can you tell me approximately when that decision was made?

A. I think that was Monday, the 13th of October, in the afternoon.

Q. Can you tell me who made that decision?

A. Sunray.

Q. Was a merger agreement among Sunray, Pacific Western and Mission prepared or drafted?

A. At that time?

Q. At any time. A. Oh, yes.

Q. Do you know who prepared or drafted it?

A. Frankly, I don't. I assume that it was drafted by Sunray's counsel in collaboration with Pacific Western's counsel and Mr. Hecht.

Q. You don't know the date?

A. The date on which that agreement between the three companies was drafted?

Q. It would be subsequent to October 13th, wouldn't it?

A. Subsequent to October 13th. It might have been started that very day, by elimination of the provisions of the agreement that had been prepared for the merger of the four companies, that is, including the Skelly Oil Company, and it would have been a comparatively simple thing to have taken and rewritten an already prepared agreement.

Plaintiff's Exhibit No. 3—(Continued)

(Deposition of Thomas A. J. Dockweiler.)

Q. Then there had been prepared an agreement for the merger of the four companies?

A. That's true.

Q. When?

A. I don't know; but it had been prepared apparently before I ever got down to Tulsa. [579]

Q. Had it not in fact been prepared before you executed your contract of October 4th?

A. That is possible, because the contract was merely the culmination and the final affirmation of agreements that had theretofore been arrived at.

Mr. Logan: Now I will address a question to all counsel here representing the defendants.

May it be stipulated that Exhibit "B" to the complaint in the California case and Exhibit "B" to the complaint in the Nevada case is a correct copy of the agreement of merger of Sunray, Pacific Western and Mission?

Mr. Boal: Mission will so stipulate in the Nevada action, subject to check as to the actual exhibit.

Mr. Logan: I think you will find it is a photolith copy.

Mr. Farrand: In reply to your question the trustee, George Getty, is not a party to it. It is attached to a sworn exhibit, and we do not doubt its authenticity, but we will stipulate to it only subject to checking it and seeing the original document itself, which I think I am correct in saying that neither our client nor ourselves have ever seen. I know of no reason to doubt it, but in that degree

Plaintiff's Exhibit No. 3—(Continued)
(Deposition of Thomas A. J. Dockweiler.)

of caution which I think we ought to exhibit we stipulate to it subject to check, and if it becomes important we can get the original and read it.

Mr. Logan: That is quite satisfactory. [580]

Mr. Sterry: We will make the same stipulation, that is, that it is correct subject to check.

Of course, our stipulation is only as to the exhibit attached in the California complaint.

Q. (By Mr. Logan): Mr. Dockweiler, you are a director of Mission Corporation, are you not?

A. Yes.

Q. Will you please tell me the names of the other directors?

A. Mr. Arthur M. Boal, Mr. Fero Williams, Mr. Emil Kluth, Mr. William G. Skelly, Mr. Arch H. Hyden, Mr. D. T. Staples, and myself.

Q. Was B. I. Graves formerly a director of Mission? A. He was.

Q. Do you know on what date he resigned?

A. Some time prior to the meeting of October 18, 1947, of the board of directors of the corporation.

Q. Did you suggest to him that his resignation would be acceptable?

A. That it would be acceptable?

Q. Yes. A. I did.

Q. When did you do that, please?

A. When he phoned me that he was resigning.

Q. When was that?

A. When I was in Tulsa. [581]

Plaintiff's Exhibit No. 3—(Continued)
(Deposition of Thomas A. J. Dockweiler.)

Q. About the 13th of October?

A. No; I think that was about the middle of the week.

Q. Of the 13th? A. Yes.

Q. I am just trying to get an approximate date.

A. It was between the 13th of October and the 18th of October. He phoned me that he had resigned, that he was not going to be at the meeting.

Q. Prior to October 18, 1947, did you discuss the merger agreement, Exhibit "B", with any of Mission's directors?

A. Yes; I discussed it with Mr. Kluth, Mr. Williams, Mr. Boal, Mr. Staples, who became a director at the meeting of October 18, and I personally had gone through the original draft; that is, the draft for the four-company merger.

Q. When did you first go through the draft for the three-company merger?

A. Well, I eliminated items that pertained to the Skelly Oil Company on that. I discussed the merger.

Q. Mr. Dockweiler, wait a minute, please.

A. The merger agreement.

Q. Wait a minute. Will you please tell me when you first read the document that is now attached to these complaints as Exhibit "B"?

A. Frankly, I don't know. [582]

Mr. Hecht: The document or draft?

The Witness: The draft—I don't think I have ever seen it except at the meeting, the original,

Plaintiff's Exhibit No. 3—(Continued)
(Deposition of Thomas A. J. Dockweiler.)

that is, the final draft that was signed, but I assumed that that draft was similar to the draft that I think I saw two or three days before the meeting. I assume that there had been no substantial change in the printed draft that I had at that time.

Q. (By Mr. Logan): Then let me put it this way: The first time you saw a draft of the three-company merger was two or three days before the meeting?

A. It may have been not two or three days. It may have been a day or so before the meeting. After the change had been made, I think I saw a draft of that a day before the meeting at the Tulsa Hotel—at the Mayo Hotel in Tulsa.

Q. When did you discuss it with Mr. Boal?

A. On the 17th.

Q. And Mr. Williams?

A. Mr. Williams, that particular draft?

Q. Yes, sir.

A. I had already discussed the other agreement with him, and when it came to this three-party—that is, the three-corporation merger, I think we both had it pretty well in mind, and it was a very simple thing.

I never discussed this particular form of three-party agreement, because we just assumed the eliminations in our [583] discussions. We had been discussing this merger for 41 days before, and the elimination of the Skelly Oil Company greatly simplified the picture.

Plaintiff's Exhibit No. 3—(Continued)
(Deposition of Thomas A. J. Dockweiler.)

Q. When did you discuss it with Mr. Staples?

A. Days before; right down to the time that he arrived in Tulsa, before the meeting. But I had already discussed the matter with him days before.

Q. You are talking now that you had discussed with him the original agreement?

A. That is the four-corporation agreement?

Q. Yes.

A. But with the elimination—the elimination of the Skelly Oil Company. It was just eliminating the further problems from the agreement. There was no difficulty in that.

Q. Now, then, I will ask you something about the original agreement. Who prepared it?

A. I don't know. I didn't see it until it was prepared.

Q. When did you first see it?

A. Well, if you mean by a draft of the original, a draft of it, that is, a copy of it——

Q. All right.

A. Because, as I said, the one that was signed I didn't see until the day of the meeting; but a printed copy of it I think I saw the day before the meeting. [584]

Q. The day before the meeting? A. Yes.

Mr. Hecht: When you say "original," do you mean the original?

A. Not of the four-party agreement, no. I thought he meant the original of the three-party agreement. That particular document, that parti-

Plaintiff's Exhibit No. 3—(Continued)
(Deposition of Thomas A. J. Dockweiler.)

cular aggregation of pages, printed, I don't think I saw until the day of the meeting, but the printed draft, which was the same, coming from the same type, presumably, I think I saw the day before the meeting.

Q. (By Mr. Logan): Now, I want to make myself clear, and I want to just leave the three-company contract. I want to get clear away from it now and talk about the four-company merger agreement that you have mentioned as having existed. That is the one between Pacific Western, the Mission, Skelly, and Sunray.

When did you first see a draft of that document?

A. In Los Angeles, before I left for Tulsa.

Q. That was on October 5th—no, it was later than that.

A. I left for Los Angeles on October 9th, because I took a copy of that printed draft with me.

Mr. Sterry: I understood you to say that you left for Los Angeles.

The Witness: I mean I left Los Angeles for Tulsa on October 9th. [585]

Q. (By Mr. Logan): Prior to the meeting of directors of the Mission on October 18, 1947, did you furnish to them any copies of the three-company merger agreement?

Mr. Sterry: May I have that question read?

(The reporter read the question.)

Plaintiff's Exhibit No. 3—(Continued)

(Deposition of Thomas A. J. Dockweiler.)

Q. (By Mr. Logan): If you know, did anyone else furnish them copies of that agreement before the October 18th meeting?

A. Yes; I assume that was done to certain of the directors because I saw copies around.

Q. To which of the directors was it so furnished?

A. Frankly, I don't know. As I say I saw copies at one or more of our conferences or gatherings.

Q. Who did you see with copies?

A. Well, I couldn't tell you that, because we had conferences on the 17th; Mr. Boal, Mr. Staples, Mr. Williams each probably had a copy and we had a lot of papers, and who received a particular paper and from whom the particular paper was received I wouldn't be able to tell you.

Q. Very well.

A. We were just in conference or talking.

Q. Was this three-company merger agreement submitted to counsel for Mission? A. It was.

Q. When? A. I think on the 17th. [586]

Q. Did I understand you to say, Mr. Dockweiler, that the Agreement of October 4, 1947, between you and Mr. Getty, as trustees, and Mr. J. Paul Getty, individually as trustee, and Sunray, had been amended?

A. I didn't say that, but I can tell you that it was amended.

Q. Can you tell me when?

A. I don't remember the date. I signed the original counterparts of it—it must have been subse-

Plaintiff's Exhibit No. 3—(Continued)
(Deposition of Thomas A. J. Dockweiler.)

quent to the determination that the Skelly Oil Company would not be a part of the merger.

Q. Of course I have no subpoena duces tecum for you, but are you willing to furnish a copy of the amended agreement ?

A. I have no objection to a copy being furnished. I haven't a copy myself, so I have no objection to a copy being furnished.

Mr. Sterry: We will furnish you a copy. I don't know if we can do it before Monday, because our office closes at noon.

Mr. Logan: That will be quite satisfactory. Thank you.

The Witness: But I can say that it was satisfactory in form to me, or else I would never have signed it, even though I haven't a copy in my possession now.

Q. (By Mr. Logan): Do you know how many shares of [587] Tide Water stock Pacific Western owns?

A. I will have to be refreshed. I wouldn't attempt to remember those long figures, gentlemen.

Q. I understand that.

Mr. Sterry: It is all set forth in the Mission Corporation proxy statement.

A. 577,854.

Q. (By Mr. Logan): Do you know how many shares of Tide Water stock Mission owns?

A. 1,341,493 shares.

Mr. Boal: That is not quite right.

Plaintiff's Exhibit No. 3—(Continued)
(Deposition of Thomas A. J. Dockweiler.)

The Witness: Is it a little more? No; I will withdraw my answer.

Mr. Boal: Here it is. That is right. (Mr. Boal refers to document.)

A. 1,345,593 shares.

Q. (By Mr. Logan): During the negotiations leading up to the execution of the contract of October 4, was there any discussion with you concerning the sale of that Tide Water stock owned by Pacific Western and Mission?

Mr. Sterry: May I have the question, please?

(The reporter read the question.)

A. Yes. The discussion was to the effect—I think I have already testified—that Sunray Oil Corporation, if the merger went through, would sell the Tide Water stock that it would receive on that merger from Pacific Western and [588] Mission Corporation.

Mr. Sterry: Counsel, I might suggest that it might save a lot of reporter's notes and time if we took some simple designation for your October contract, that is, the contract of October 4. Every time you repeat it. Can't we give a short designation to it and maybe call it the Getty contract?

Mr. Logan: Well, we can call it the contract of October 4. That would suit me.

Mr. Sterry: All right.

Q. (By Mr. Logan): Do you know that Sunray now has outstanding debentures and a note in the total principal of $29,000,000?

Plaintiff's Exhibit No. 3—(Continued)
(Deposition of Thomas A. J. Dockweiler.)

A. Whatever the statement shows, that is correct.

Q. Do you know that if this merger becomes effective that Sunray must refund or refinance that obligation? A. I assume it must.

Q. Do you know whether it must or not?

A. Well, I assume it must, from the terms of the debentures. They have been explained to me.

Q. When did you have those terms explained to you?

A. That would be pretty hard to say. I guessed it may have been before the contract of October 4 was ever signed, or later.

Q. Did you understand, or was it your information, that if such merger was made that there be a premium or [589] penalty to be paid of $750,000?

A. Somewhere along the line I was advised that.

Q. Do you remember when? A. No.

Q. Was it before or after the directors' meeting of October 18? A. Before.

Q. Are any commissions payable in connection with the agreement of October 24?

Mr. Boal: I will object to that question. Do you want to put it all in one question? They are all set forth in the statement.

Mr. Logan: I quite agree with you on that, that it would shorten me up a lot.

The Witness: What is your question? I can answer that right off.

Plaintiff's Exhibit No. 3—(Continued)
(Deposition of Thomas A. J. Dockweiler.)

Mr. Logan: I think I might just as well proceed.

Mr. Sterry: Your statement is, I think, not quite clear. It would lead my mind—the question, as I heard it, indicated was there any commissions due in regard to this sales agreement of October 4, 1947. What I am thinking, you are asking for the commission to be paid——

Mr. Logan: Let me try to rephrase the question.

Q. Now, I will use a little broad language, if I can.

In connection with the agreement of October 4, 1947, and the merger of the three companies, are any commissions [590] to be paid to Eastman, Dillon & Company?

A. The compensation of Eastman, Dillon & Company is set forth in the proxy statement of the Mission Corporation in detail, and I would be happy to read from that, because I frankly don't remember the figures as they are set forth.

I can say this: there are no commissions, compensation, fees of any kind, payable by the trustees of the trust, and so far as I know, by Mr. J. Paul Getty for making this sale.

The sale, as it were, is net to us.

Q. There are commissions payable to Mr. Parkford, are there not, in the event that the Tide Water stock is sold?

A. That is stated in the proxy statement.

Q. I am going to try to get around to letting you incorporate that in your answer, if I can.

A. That is correct. That is my understanding.

Plaintiff's Exhibit No. 3—(Continued)
(Deposition of Thomas A. J. Dockweiler.)

Q. And the details pertaining to those commissions as contained in the Mission Corporation proxy statement are correct?

A. My understanding is that those details are correct.

Q. Of course, you don't know anything about commissions that Sunray might be obligated to pay in connection with the merger, except those that have been disclosed and stated in the Mission statement?

A. That is true, because I only know what has been disclosed to us. I assume, however, that that is [591] complete.

Mr. Hecht: According to the S. E. C. it is not.

The Witness: Incidently, that is the basis of my assumption, among other things.

Q. (By Mr. Logan): Do you know the amount of underwriters' fees and discount that may be payable in connection with the sale of debentures and preferred stock to be issued by the surviving corporation, if the merger becomes effective?

A. Only as those figures that are again incorporated in the proxy statement of the Mission Corporation.

Q. So far as your knowledge is concerned, the statements in the proxy statement on that matter are correct? A. That is true.

Q. The proxy statement also contains an itemization of the estimated cost of the merger, does it not, Mr. Dockweiler? A. It does.

Plaintiff's Exhibit No. 3—(Continued)
(Deposition of Thomas A. J. Dockweiler.)

Q. Do you affirm that that estimate, so far as you know, is an accurate one?

A. To the best of my knowledge, that is accurate.

Q. Then we won't have to go into detail on that.

The proxy statement also contains a statement that the gross proceeds of the Tide Water stock sale will be $48,086,175, and that after a reserve for taxes the net proceeds will be $39,870,770.

Mr. Boal: What page are you looking at? [592]

Mr. Logan: Two different pages; page 5, $48,-086,175, and on page 6, in the first full paragraph, it has the second figure. Do you find it?

Mr. Boal: I have it. Those figures cover both Mission and Pacific Western shares?

Mr. Logan: Let me start the question again, because we were interrupted somewhat in the middle of it.

Q. The Mission proxy statement shows that the Tide Water stock now owned by Pacific and Mission is to be sold for an aggregate of $48,086,175?

A. That is at the rate of $25 per share.

Q. At the rate of $25 per share, which will provide $39,870,770 after reserve for income taxes. Is that a correct statement?

A. To the best of my understanding, it is.

Q. The Mission Corporation proxy statement contains, does it not, balance sheets, profit and loss statements, and similar data concerning the three companies to the merger? A. That is correct.

Q. As of December 31, 1946? A. Yes.

Plaintiff's Exhibit No. 3—(Continued)
(Deposition of Thomas A. J. Dockweiler.)

Q. Are those correct statements?

A. I couldn't say that those statements are correct. I must assume that they are correct. I am no accountant. I am no accountant for either one of the three companies. [593] I assume that they are correct or else they wouldn't have been furnished the Mission Corporation.

Q. Is the Mission Corporation statement included in that a correct copy of the actual balance sheets, profit and loss statements, and accompanying papers that form the books of the Mission Corporation's records?

A. To the best of my knowledge.

Q. Is the same thing true as to the balance sheets and financial statements as of Pacific Western? A. To the best of my knowledge.

Q. What about Sunray?

A. Well, you see, I haven't very much contact with Sunray, and as a consequence I wouldn't be able to say, to speak of Sunray's financial statements in the same way that I would be able to speak of Mission's financial statements or Pacific Western's financial statements. I must, in the case of Sunray, assume that they have furnished Mission Corporation with a correct statement, and it is printed in the Mission proxy statement on that assumption.

Q. Have you ever made any calculation as to the total assets of these three merging corporations, as shown by their balance sheets of December 31, 1946?

Plaintiff's Exhibit No. 3—(Continued)
(Deposition of Thomas A. J. Dockweiler.)

A. I may have heard the figure. I wouldn't remember it. I have not attempted to work out the figure in detail, as I am no accountant. The financial items that would be involved there are a matter of calculation. [594]

Q. I should like to ask you now, Mr. Dockweiler, a few questions concerning the members of the Mission board of directors.

Mr. Arthur M. Boal is an attorney, is he not?

A. He is a prominent New York Attorney.

Q. Has he from time to time in the past represented Mission Corporation in legal matters?

A. He has acted for the Mission Corporation, yes.

Q. Has he from time to time in the past acted as counsel for the Pacific Western Oil Corporation?

A. I think so.

Mr. Sterry: What was the answer, Mr. Reporter?

(The reporter read the answer.)

A. (Continuing) In fact, I know he has acted for Pacific Western in times past.

Q. (By Mr. Logan): Pacific Western has held directors' meetings in his office, has it not?

A. Yes. So I know he has. When I say I think, I mean I know that was the case.

Q. As late as 1946 was Mr. Boal a vice-president of Pacific Western? A. Yes.

Q. Do you know when he resigned?

Plaintiff's Exhibit No. 3—(Continued)
(Deposition of Thomas A. J. Dockweiler.)

A. No, I don't know the precise date. May I be refreshed a moment?

Arthur, when did you resign as vice-president of P. W.? **[595]**

Mr. Boal: I don't remember the date. It was probably in January of this year.

A. (Continuing) Well, probably in January of this year.

Q. (By Mr. Logan): Wait a minute. Maybe I can refresh your recollection. Would it be February 26, 1947? A. It might well be.

Q. Would you care to look at that document (handing document to the witness)?

A. Yes; he resigned as vice-president and as treasurer, and that resignation was accepted at the meeting of February 26, 1947, of the board of directors' meeting of the Pacific Western Oil Corporation.

Q. Do you and/or your firm act as counsel for Mission Corporation from time to time?

A. We have never acted as counsel for Mission Corporation.

Q. How about the Pacific Western Oil Corporation? A. Yes.

Q. Over a period of approximately how long?

A. Pacific Western since the early thirties.

Q. Mr. Dockweiler, I wish to invite your attention to a statement on page 27 of the Mission Corporation proxy statement, concerning Mr. Staples and some others being associated with the merged

Plaintiff's Exhibit No. 3—(Continued)
(Deposition of Thomas A. J. Dockweiler.)

corporation at substantially their present salaries, and the statement that Mr. Staples' [596] present salary from the Pacific and Mission is $27,500, and also the statement of others.

Do you have that statement? A. Yes.

Q. Is that statement a fact?

A. To the best of my knowledge.

Mr. Farrand: You point at it and say is that right.

Mr. Logan: Very well. Wait a moment. We can straighten it out.

Mr. Farrand: I don't think the reporter can tell you now unless you point at it.

Mr. Logan: The statement to which I have referred appears on page 27 of the Mission proxy statement, and is as follows:

> "David T. Staples, president and a director of both Pacific and Mission, Emil Kluth, vice-president of Pacific and a director of Mission, Fero Williams, treasurer and a director of Pacific and a director of Mission, O. M. Evans, vice-president of Pacific, and Charles F. Krug, secretary of Pacific, are expected to be associated with Sunray as employees at substantially their present salaries. Mr. Staples' present aggregate salary from Pacific and Mission is $27,500. The salary of none of the others is in excess of $15,000."

A. That is my understanding.

Plaintiff's Exhibit No. 3—(Continued)
(Deposition of Thomas A. J. Dockweiler.)

Q. Now, do you know, Mr. Dockweiler, when the [597] arrangement was made for those gentlemen last named to enter the employment of the surviving corporation at their present salaries?

Mr. Hecht: I will object to the question, as to its form. You haven't asked whether an arrangement was made. It doesn't necessarily imply an arrangement was made.

Mr. Logan: Very well. I will yield to your objection.

Q. Do you know when that expectation arose?

A. I can't say personally, because many things have been discussed in the meantime, but I can say this, that before—some time before I signed any agreement as trustee on October 4, 1947, I personally had a conference with Mr. Clarence Wright, in which I insisted with him that if the trustees and Mr. J. Paul Getty were to enter into any agreement to sell to Sunray, the heads of our departments and our top men in Pacific Western would have to be taken care of and taken over by the new company, without detriment to them, to which Mr. Wright agreed.

Q. The statement in the proxy statement says: "at substantially the same salaries."

Do you recall or do you know whether there was to be an increase or decrease, or were the salaries to remain the same?

A. That I don't know; but what I insisted upon was that they would not in any manner be injured by being taken over. [598]

Plaintiff's Exhibit No. 3—(Continued)
(Deposition of Thomas A. J. Dockweiler.)

Q. Very well. Does Pacific Western Oil Corporation hold any leases wherein the State of California is lessor?

A. Yes, two. That is, it holds a lease and is contractor on another lease.

Q. Does either of them cover tidelands?

A. They cover lands from, I think, the mean low water mark out in the Pacific Ocean at Elwood, California; State leases No. 92 and No. 93.

Q. What is the term of those leases, that is, their duration?

A. I wouldn't remember precisely. My recollection is that they were 20-year terms when originally issued.

Q. Can you recall approximately the date they were issued?

A. No, I couldn't. I would have to refresh my memory. My recollection is that they have some years yet to run, but under our law there is a preferential right given to the holder of the lease to renew.

Q. Yes, I understand. Is oil being produced in those properties? A. So I understand.

Q. Do you know how many wells there are on them? A. No. Quite a number, though.

Q. Do you know what the daily production of those wells is, approximately?

A. No, I would have to refresh my memory. I would [599] have to refresh my understanding of that by looking at the production sheets.

Plaintiff's Exhibit No. 3—(Continued)
(Deposition of Thomas A. J. Dockweiler.)

Q. I wonder if you would be good enough to do that, and furnish me with that information, please?

A. I can probably find that out, but probably not until Monday.

Q. Very well.

Mr. Logan: Gentlemen, may it be stipulated that the board of directors of the Mission Corporation has issued a call, or a notice of a special meeting of its stockholders for December 6, 1947, and, among other things, to consider and vote upon an agreement of merger dated October 18, 1947, providing for the merger of Mission, and Pacific Western Oil Corporation, a Delaware Corporation, with and into Sunray Oil Company, a Delaware corporation?

Mr. Sterry: So stipulated.

Mr. Boal: Mission so stipulates. It is set forth on the proxy statement.

Mr. Farrand: We will stipulate on behalf of George Franklin Getty II as trustee, subject to check. We are not a director or counsel for the corporation, and obviously we will do so to be helpful and not because we know; therefore, we reserve the right to check it and see; if it becomes material to deny it.

Q. (By Mr. Logan): At that meeting does Pacific Western Oil Corporation intend to vote its Mission stock in favor of [600] merger?

A. I assume so.

Plaintiff's Exhibit No. 3—(Continued)
(Deposition of Thomas A. J. Dockweiler.)

Q. Is this statement on page 27 of the notice of meeting and proxy statement of the Mission Corporation correct:

> "Mission is advised that it is the present intention of the management of Pacific to vote the 641,808 shares (approximately 47 per cent) of the Capital Stock of Mission, held by Pacific, in favor of the adoption of the agreement of merger"?

Is Mission Corporation soliciting proxies for that stockholders' meeting?

A. Yes, as shown by the proxy statement.

Q. Has the board of directors of Pacific Western Oil Corporation approved this merger agreement?

A. So I am advised. I wasn't present at the board meeting. I am neither an officer nor director, but I am told that it has been approved.

Q. Has a meeting of the stockholders of Pacific Western Oil Corporation been called to consider and vote upon the adoption of the merger agreement? A. So I understand.

Q. For what date, if you know?

A. For December 6—the 5th, in Delaware.

Q. How are you and George F. Getty going to vote your stock at that meeting? [601]

A. At that meeting?

Q. Yes, sir.

A. I assume we will vote that stock, and I can only speak for myself, because Mr. Getty is here

Plaintiff's Exhibit No. 3—(Continued)
(Deposition of Thomas A. J. Dockweiler.)
to speak for himself. I am in favor of voting that stock and in favor of the merger.

Q. Were you formerly a director of the Tide Water Associated Oil Company? A. Yes.

Q. For approximately how long were you interested? A. About five years.

Q. Did you resign? A. I did.

Q. When? A. August 1, 1947.

Q. Do you care to state your reason for resigning?

A. Personal. If you want to really know, I have no objection to telling you. The Department of Justice felt that there was a violation—they expressed to me that they considered there was a violation of the Clayton Act if I remained on the board, and I disagreed with them, and expressed my disagreement to them, but, having no particular desire to enter into a controversy with the Department of Justice, I resigned.

Mr. Hecht: Do you care to ask him which corporation, so we might have the record clear?

Mr. Logan: Just one moment and I will be with you.

Mr. Hecht: I don't want to interfere with your line of questioning, but I think it might clarify the answer, and I make the suggestion that you again ask him between which corporations there would be a conflict, as suggested by the Department of Justice.

Plaintiff's Exhibit No. 3—(Continued)
(Deposition of Thomas A. J. Dockweiler.)

The Witness: Between the Tide Water Associated Oil Company and the Skelly Oil Company; that is, they alleged that there was competition within the meaning of the Act between the two companies.

Q. (By Mr. Logan): Will you tell me, please, who suggested the terms of October 4 contract?

A. I think those terms were worked out between us in the course of conferences. I don't know who made any particular suggestion. I think we all did some suggesting on the subject in arriving at what should be in the contract, and then the drafting of the contract was left to one or more of them in final form, and it came to me with suggestions all written in.

Q. Then, as we would say, in Oklahoma, you just horse traded around and came out with this contract?

A. I think that would be a correct expression.

Mr. Logan: I believe that is all we have.

I do have one more question I would like to ask you, Mr. Dockweiler. Are you willing to furnish us with a statement showing, as to the officers of the Pacific Western [603] Corporation, the salary that each of them drew as of January 1, 1946, and the date and amount of any subsequent changes?

A. Yes. Now, will you specify your officers?

Q. Your president, Mr. Staples; vice-president, Mr. Emil Kluth; and treasurer, Mr. Fero Williams.

A. Yes.

Plaintiff's Exhibit No. 3—(Continued)

(Deposition of Thomas A. J. Dockweiler.)

Q. And Mr. O. M. Evans, a vice-president of Pacific and Mr. Krug, a secretary of Pacific.

A. All right.

Q. Will you also be good enough to furnish me with a statement of the salaries on January 1, 1946, the date of changes and the amount to which changed, for the following officers of Pacific——

Mr. Hecht: Why not make it all the officers? I think it would be easier.

Mr. Logan: I think it would be.

The Witness: There is no objection to that.

Mr. Logan: Without reference as to who may have been the encumbent at that particular time.

The Witness: All right.

Mr. Logan: And Mission also?

The Witness: Yes.

Q. Mr. Dockweiler, may I ask you another question: if any of the people named in the proxy statement here on page 27— Do you want those named? [604]

A. No.

Q. Any of those people were in the employ of either of these companies and drawing a salary, even not as officers, and, if so, will you tell me their salaries, please? A. Yes.

Q. And the changes over that same period of time? A. What page of that proxy?

Q. Page 27. There are several page 27s, Mr. Dockweiler, but the first page 27.

Mr. Boal: The others are exhibits. It is of the statement.

Plaintiff's Exhibit No. 3—(Continued)
(Deposition of Thomas A. J. Dockweiler.)

Mr. Logan: That is right. We have no further questions.

Mr. Sterry: No questions.

Mr. Boal: No questions.

Mr. Farrand: No questions.

Mr. Logan: It is so near 12 o'clock that I believe it would be inconvenient to start the examination of another witness at this time. We should like to adjourn the taking of the depositions until after lunch.

Would 1:30 be convenient for you gentlemen?

Mr. Sterry: How about one o'clock?

(Discussion off the record.)

Mr. Sterry: You gentlemen also gave a notice to Mr. J. Paul Getty to take his deposition at this time. At [605] the time you gave the notice, I believe it was ineffective, because no service had been made on him. I took the matter up afterwards. You did attempt a service, which I am waiving any question as to whether it was good or not, but, needless to say, Mr. Getty authorized us to appear for him. I took the question up with Mr. Wright, and he advised me that we would arrange, when you gentlemen arrived here, for the taking of Mr. Getty's deposition in Oklahoma, and that he need not appear here today.

Now, I have understood from him that you are not yet in a position to make an agreement because you don't know whether you will be able to take his deposition before the hearing; is that correct?

Plaintiff's Exhibit No. 3—(Continued)
(Deposition of Thomas A. J. Dockweiler.)

Mr. Reinhart: I would like to make a statement. No definite subpoena was issued with an attempt to be served prior to the issuance of the summons in the California case. The summons was, first, not only attempted to be served, but was served upon him in his residence in California.

Mr. Hecht: I am not raising any question about it, but Mr. Getty is in Oklahoma and is willing to give his deposition any time you want.

Mr. Sterry: My understanding was the other way, that I need not apply to the court on any motion, but that we make an agreement about that.

Mr. Logan: I can go with you, Mr. Sterry; that may settle it. So far as we are concerned, we will not make [606] any issue or motion, or raise any question as to whether or not Mr. J. Paul Getty should be in attendance on these depositions today.

Mr. Sterry: We will agree with you that if you find it necessary to take his deposition, we will agree with you any time at your convenience.

Mr. Hecht: Except that we want 24 hours' notice.

Mr. Rinehart: Will Mr. J. Paul Getty be present at the trial of the California case?

Mr. Sterry: Now you are asking something. I don't believe that there is going to be any trial. I will be very much surprised if you survive a motion; and, if you do, when it is set for trial, it is highly problematical, and I wouldn't indulge in matters of conjecture and speculation, but if there is a date

Plaintiff's Exhibit No. 3—(Continued)
(Deposition of Thomas A. J. Dockweiler.)

set for the trial, I think I can say that he will either be here or you will have ample opportunity to take his deposition.

Mr. Rinehart: Will he be available for the temporary injunction hearing in California now set for November 24, 1947, at 10 a.m.?

Mr. Hecht: He is not inclined to be here. He is busy in Tulsa, Oklahoma. He is president of the Spartan Aircraft Company, and he states that it is a matter of great importance to him to attend to business with that company, but that he is perfectly willing at any time to give his deposition in Oklahoma, but he is not planning on [607] coming to California at this time. He is the president of the Spartan Aircraft Company, and at the same time it is in the throes of making new arrangements, and it is vital business of that company, and he can't take the time off to come to California. He doesn't fly, and it would require a trip by train, and it would be detrimental to the affairs of the Spartan Aircraft Company; so he suggests that you take his deposition in Oklahoma. The plaintiff resides there, and a majority of your counsel reside there.

Mr. Logan: We are not ready to announce a decision at this time.

Mr. Sterry: I would like to have it a matter of record, because it was informal discussion, and we will leave it that way, and you decide when you want to take the deposition and we will be glad to stipulate with you on reasonable notice.

Plaintiff's Exhibit No. 3—(Continued)
(Deposition of Thomas A. J. Dockweiler.)

Mr. Rinehart: I don't see how it would be possible to get any deposition at all before the hearing of the two cases here. For the purpose of the record, as Mr. Hecht has stated his position, there are a great many more people interested and involved in this matter than there is in the Spartan Aircraft Company, and we are sorry that he wasn't here today.

Mr. Logan: Let us take a recess at this time until 1:30 [608]

(Whereupon, at 12:05 o'clock p.m., further proceedings in the matter of the taking of depositions was adjourned until 1:30 o'clock p.m. of the same day, at the same place.)

/s/ THOMAS A. J. DOCKWEILER,
Witness. [609]

GEORGE FRANKLIN GETTY II

called as a witness on behalf of the plaintiff herein, having been first duly sworn, deposed and testified as follows:

Direct Examination

By Mr. Logan:

Q. Please state your name.
A. George Franklin Getty II.
Q. Where do you live?
A. 2355 Adair Street, San Marino, California.

Plaintiff's Exhibit No. 3—(Continued)
(Deposition of George Franklin Getty II.)

Q. Are you one of the trustees under a declaration of trust executed by Sarah C. Getty on the date of December 31, 1934, by Mr. Getty?

A. I am.

Q. Without going into the details of it, you and Mr. Dockweiler, as such trustees, own certain shares of stock in Pacific Western Oil Corporation, do you not? A. That is right.

Q. Will you please tell me when it was first suggested to you that that stock be sold for cash?

A. Is there any particular deal in mind?

Q. Well, we will say to Sunray Oil Corporation.

A. I would say about the middle of August of this year.

Q. Who mentioned that to you, please? [610]

A. I think it was mentioned to me by my counsel through contacting Mr. Dockweiler.

Q. When did you next confer or consult with anyone concerning the proposed sale?

A. Well, in August or prior to August, why, there had been quite a few irons in the fire in connection with selling the stock to other organizations, other people, and more or less as one fell by the wayside another took its place, and the Sunray deal was just another deal that had come along, and with that, why, I don't think that any new people were talked to—Mr. Dockweiler and my father, my attorneys, naturally, a little later to Mr. Skelly—in fact, any source that could give me any information whatsoever as to whether a cash sale was advisable or whether to stay in the oil business was advisable.

Plaintiff's Exhibit No. 3—(Continued)
(Deposition of George Franklin Getty II.)

Q. I take it from what you said that for some time prior to August of this year the question of selling the Pacific Western stock for cash had been under consideration? A. Yes.

Q. Would it be correct to say that, prior to August of this year, an effort was being made to effect the sale of the stock for cash?

A. Well, now, I wouldn't say an effort was being made. The thing was being talked about; it had natural attractiveness [611] at this time where the oil business was at a very high peak, values were high, and naturally the stock owned by the trust was situated in one equity and one oil company, and subject to all the hazards and all the benefits, naturally, of that oil business; and presuming that under such present economic conditions a good price could be gotten from a person who had the money, why, it was just the general idea that, if someone were available, a good price was to be gotten, and if arrangements could be made, then it would be a wise thing to sell out under the present advantageous economic situations.

Q. Could you tell me approximately how many conferences you participated in between sometime in August and the 4th day of October pertaining to the sale of this stock, or did you leave that to your attorneys?

A. I left the work to my attorneys, the actual—shall we say groundwork—but I was naturally in contact with them all the time and they were in

Plaintiff's Exhibit No. 3—(Continued)
(Deposition of George Franklin Getty II.)

contact with Mr. Dockweiler and Mr. Hecht, and through those people with my father and various other parties, so it might be said that through my attorneys I was in contact with all parties, and how often I talked to my attorneys was—oh, I would say several times a week, all depending on what was in the fire.

Q. You did of course sign the agreement of October 4th? [612] A. I did.

Q. In Los Angeles?

A. Yes; in Mr. Farrand's office, Pacific Southwest Building.

Q. At the time you signed it had anyone else signed it?

A. Yes; my father had signed it, my co-trustee, Thomas A. J. Dockweiler, the president and counsel of the Sunray Oil Corporation, Lloyd Gilmour, Mr. Lloyd Gilmour of Eastman, Dillon, and his counsel, and I was the last one to sign it.

Q. After the execution of the October 4th contract, was anything said to you concerning the execution of an amendment to the contract?

A. Several weeks later, I would say about the middle of October, my attorneys, talking to Mr. Hecht and Mr. Dockweiler, advised me that the plans which were formerly to merge four companies, namely, Pacific Western Oil Corporation, Mission Corporation, Skelly Oil Company, and Sunray Oil Corporation, had been changed to effect the same merger, but not include the Skelly Oil Com-

Plaintiff's Exhibit No. 3—(Continued)
(Deposition of George Franklin Getty II.)

pany, and that, while it was not particularly necessary, it would be a good idea to enter into a supplemental agreement whereby all parties signed and showed their agreement to such a supplemental act.

Q. Did you sign the supplemental agreement?

A. I did.

Q. About when, if you can receall?

A. I would say about November 1st, 2nd, 3rd; somewhere in there.

Q. Somewhere in the early part of November?

A. Yes.

Q. That is, of course, this year? A. Yes.

Q. At the time the October 4th contract was signed, and before that, had you given any consideration to how Sunray might raise the necessary cash to pay for the stock?

A. Not particularly. I mean, that is always an interesting speculation in any part of any deal, but my interest in the arrangement was merely as a trustee of this majority stock interest in Pacific Western Oil Corporation, and then, having been offered a suitable price for it in cash, why, I was interested in seeing eventually that, if the deal went through, I got the cash for my stock; but how the cash was gotten together wasn't of too much importance to me, I mean, from the mechanical point of view.

Q. And therefore I take it that you did not concern yourself too much with that detail?

A. No.

Plaintiff's Exhibit No. 3—(Continued)
(Deposition of George Franklin Getty II.)

Q. Was it brought to your attention at any time that [614] the corporation surviving this merger intended to sell the stock of Tide Water Associated Oil Company now owned by the Mission Corporation and Pacific Western Oil Corporation?

A. Yes.

Q. Was the price stated to you?

A. Yes; $25 a share.

Q. Was that before you signed the contract, Mr. Getty, that that was brought to your attention?

A. I believe it was.

Q. Was it also brought to your attention that the surviving corporation intended to sell debentures or notes and to issue preferred stock to raise money? A. Yes.

Q. Was that brought to your attention before or after the October 4th contract was signed?

A. I believe before.

Q. But I believe, as you said, you did not concern yourself with the details of it?

A. Not particularly.

Q. Were you informed as to what, if any, commissions might be payable in connection with the sale of the Tide Water stock and in connection with the sale of your stock as trustee in the consummation of the merger?

A. I had heard, and I cannot remember the source of this hearing, this information, that Mr. E. A. Parkford, having initially worked on the Tide Water sale—attempted [615] sale—was going to be

Plaintiff's Exhibit No. 3—(Continued)
(Deposition of George Franklin Getty II.)

entitled to 50 cents a share commission on the stock sold by the surviving corporation to Tide Water, and naturally I was under the impression, just from a business point of view, that the services of Eastman, Dillon were not of—you know, in a charitable way, I mean—they got something for their services. I read in the paper the other day the actual figures.

Q. Was that the first time you knew them?

A. Yes.

Q. Have you seen a copy of the agreement of merger between the three companies which is dated, I believe, October 18, 1947?

A. Can you identify that document?

Q. That is attached to the bill of complaint in each of these cases as Exhibit "B."

A. No, I don't believe so. The complaint I got was a photostat copy and Exhibit "A," I think, the memorandum of agreement, was attached, but Exhibit "B" was unattached.

Q. You refer to it before the lawsuit. Have you ever seen it, then? A. No.

Q. And today when it is exhibited to you is the first time you have seen it? A. Yes. [616]

Q. Is it correct, Mr. Getty, that a meeting of the stockholders of Pacific Oil Corporation has been called for December 5th of this year?

A. Yes; that is what I have been informed.

Q. And that one of the purposes of that meeting is to vote upon the adoption of the proposed merger of the three companies?

A. That is what I have been informed.

Plaintiff's Exhibit No. 3—(Continued)
(Deposition of George Franklin Getty II.)

Q. Have you any present intention as to how you intend to vote your stock as trustee at that meeting?

A. I will vote my stock in favor of the merger.

Mr. Logan: That is all.

Mr. Fisher: No questions.

Mr. Sterry: No questions.

Mr. Boal: No questions.

Mr. Sterry: Gentlemen, a question was raised this morning in the discussion, in which it was stated that a summons and complaint had been served on Mr. Getty before any attempt at a subpoena.

I don't think he meant subpoena; I think he meant notice to take deposition.

However that may be, Mr. Getty is stating that he has been out of town, and I personally was out of town, and I don't know that we have any record as to when such service, if effective, was claimed to be effective, and therefore the date on which he should appear. I assume my office [617] has the time for the appearance of Pacific Western. Would it be satisfactory if we appear for Mr. Getty at the same time in which we make any appearance for Pacific Western?

Mr. Logan: I should think that would be a matter that would be entirely up to you, Mr. Sterry.

Mr. Hecht: Can you tell me when the service was effected? It was left at his home, and he was out of town, and he doesn't really know when it was effected.

Plaintiff's Exhibit No. 3—(Continued)
(Deposition of George Franklin Getty II.)

Mr. Rinehart: That will be evidenced by the court records.

Mr. Sterry: The court has no record as to when you left it or when it was mailed. We intend to appear for Pacific Western this week. All I am asking you gentlemen, is it satisfactory if we appear at the same time for Paul Getty? I don't know what time the service was made or what time you claim you made it.

Mr. Logan: I think I see what you have in mind. If this answers your question, Mr. Sterry, the bill was not filed until the 4th of November, so if what you have in mind is answer time, it cannot possibly have expired.

Is that what you had in mind?

Mr. Sterry: That is right. That is what I had in mind.

I didn't want to trap you gentlemen in any way. I had forgotten the fact that it had not been filed before the 4th. [618]

Mr. Logan: That is right. Your answer time could not possibly have expired.

I would like to ask one more question of counsel here.

Could it be stipulated between us that this document that I hold here is a copy of Mission Corporation's notice of meeting and proxy statement?

I am not talking about the correctness of the statements therein contained, or anything else, but may we stipulate that that is the notice of meeting and proxy statement?

Plaintiff's Exhibit No. 3—(Continued)

(Deposition of George Franklin Getty II.)

Mr. Boal: Is that one that was mailed to you?

Mr. Logan: No. Somebody gave that to me this morning here around the counsel table.

Mr. Hecht: I gave it to you. I can stipulate it is the one I gave to you.

Mr. Farrand: I will stipulate that, so far as trustee Getty is concerned, if the copy you had is the same as the copy that I had, and if the copy that I had, which was given to me by Mr. Boal, is a copy of the notice, then the copy I have and you have is a copy of the notice.

Mr. Logan: I am sorry I brought it up! Let it go! We can prove it otherwise.

/s/ GEORGE FRANKLIN GETTY II.
Witness. [619]

State of California,
County of Los Angeles—ss.

I, W. L. Heathcote, a Notary Public for the County of Los Angeles, State of California, do hereby certify that Thomas A. J. Dockweiler and George Franklin Getty II were by me first severally sworn to testify the whole truth and that the above depositions by them respectively signed were recorded stenographically in my presence and under my personal direction by Robert H. Clark and Laura Breska, stenotypists, and by Herbert H. Bronck reduced to typewriting under my personal direction.

Plaintiff's Exhibit No. 3—(Continued)

I further certify that the said depositions were respectively examined and read over by said deponents and were respectively signed by said deponents in my presence, having first made the following changes and corrections in the deposition of the deponent, Thomas A. J. Dockweiler, to wit:

On Page 8, line 23, change "Inc." to "Incorporated," as witness states George F. Getty, Inc., and George F. Getty, Incorporated, are two different corporations, and that he referred to the George F. Getty, Incorporated.

On page 10, line 9, "successor" should be "successors," this being a typographical error; page 10, line 17, "they" should be changed to "he," an obvious grammatical error; page 10, line 26, after the first word "Getty," add "the lawful issue of any deceased child of Mr. Getty," the [620] witness stating that the answer as appearing in the deposition was as he gave it, but that the above addition further clarifies and makes his answer more complete.

Page 13, line 23, the proper name "Grank" should be "Frank," an obvious typographical error.

Page 13, line 26, "1 th" should be changed to "17th," an obvious typographical error.

Page 20, line 20, change "Farrant" to "Farrand," a typographical error.

Page 25, line 1, the question beginning on page 24, line 26, and ending on page 25, line 1, should have read: "Who first mentioned to you the possibility of selling this stock to Sunray Oil Corpora-

Plaintiff's Exhibit No. 3—(Continued)

tion," as subsequent text will corroborate. This correction was made upon the responsibility of the Reporter at the suggestion of the deponent.

Page 25, line 5, change "direction" to "directly," presumably an error of the reporter not having heard the word correctly.

Page 26, line 20, change "Pettigrew" to "Petigrue," the name not having been spelled out for the reporter at the time the testimony was given; line 26, change "Splke" to "spoke," a typograhical error.

Page 27, line 11, change "Pettigrew" to "Petigrue," the correct spelling not having been given to the reporter by the witness. [621]

Page 29, line 22, change "Shekly" to "Skelly," a typographical misspelling of the name.

Page 30, line 19, after the word "his" insert parenthetically "Mr. Farrand's," this addition being made for sake of clarity and to designate that the document was signed in Mr. Farrand's office and not Mr. Getty's office.

Page 37, line 22, change the first "it" to "I," this being an obvious typographical error corrected by the reporter.

Page 43, line 9, after the word "done," eliminate the comma and insert "to certain of the directors," the witness stating he could not vouch as to all of the directors; line 13, after the word "at," insert "one or more of," and after the word "conferences" add "or gatherings," the witness stating that "one or more" of their conferences would be more nearly

Plaintiff's Exhibit No. 3—(Continued)

correct than the assumption that it was at all of the conferences, and witness further stating that they might be more properly called gatherings than conferences, in the strict sense of the word; line 17, after the word "Williams," insert "each probably had a copy," to indicate that the three men in question were each in possession of a copy rather than possessing one copy only and that jointly; line 21, after the word "conference" add "or talking," indicating that it might be less formal than a conference; line 26, change "10th" to "17th," the latter being obviously correct, according to the [622] witness and the error probably being typographical.

Page 46, line 16, change "Sunday" to "Sunray," this being a typographical error; line 23, change "must" to "may," the witness stating this more correctly reflects the intent of his statement; line 24, after the word "signed," add a comma, and also "or later," the amplification made by the witness for the sake of clarity and correctness.

Page 49, line 9, delete the word "that," the same being grammatically incorrect.

Page 51, line 23, after the word "I," insert the word "May," this modification the witness stating more correctly reflects the intent of his testimony.

Page 58, line 15, change "meeger" to "merger," an obvious typographical misspelling.

I further certify that the said depositions, as above amended, changed and corrected, constitute a true record of the testimony given by each of said witnesses.

Plaintiff's Exhibit No. 3—(Continued)

I further certify that the said depositions were taken at the time and place specified in the annexed notice, and that the taking of the said depositions commenced on the 15th day of November, 1947, at 9:00 o'clock in the morning and was completed at 2:30 o'clock in the afternoon of said day.

I further certify that Villard Martin, Esq., Garrett Logan, Esq:, Theodore Rinehart, Esq., and Harold C. Stuart, [623] Esq., of the City of Tulsa, State of Oklahoma, appeared as attorneys for the plaintiff, and Arthur M. Boal, Esq., of the City of New York, State of New York, and Lester D. Summerfield, Esq., and Robert C. Hawkins, of the City of Reno, State of Nevada, appeared as attorneys for the defendant.

I further certify that neither I nor the said Robert H. Clark nor Laura Breska, reporters, is an attorney or counsel of any of the parties, or is a relative or employee of any attorney or counsel connected with the action, or is financially interested in the action.

[Seal] /s/ W. L. HEATHCOTE,

Notary Public in and for the County of Los Angeles, State of California.

My commission expires September 15, 1951.

[Endorsed]: Filed Nov. 21, 1947.

In the District Court of the United States
for the District of Nevada

No. 669

WILLIAM G. SKELLY,

Plaintiff,

vs.

MISSION CORPORATION, a Corporation,

Defendant.

CERTIFICATE OF CLERK
U. S. DISTRICT COURT

United States of America,
District of Nevada—ss.

I, Amos P. Dickey, Clerk of the District Court of the United States for the District of Nevada, do hereby certify that I am custodian of the records, papers and files of the said United States District Court for the District of Nevada, including the records, papers and files in the case of William G. Skelly, Plaintiff, vs. Mission Corporation, a corporation, Defendant, No. 669 on the civil docket of said Court.

I further certify that the attached transcript, consisting of 722 typewritten and printed pages numbered from 1 to 722, inclusive, contains the portion of the record under Rule 75, subdivision J, of the Federal Rules of Civil Procedure, as requested by appellant, together with the endorsements of filing thereon, and as set forth in "Desig-

nation of Record on Appeal" filed herein by appellant and defendant on December 8, 1947, which is filed herein and made a part of the transcript attached hereto, as the same appear from the originals of record and on file in my office as such Clerk in Carson City, State and District aforesaid.

I further certify that the cost of preparing and certifying to said record, amounting to $300.80, has been paid to me by Hawkins, Rhodes & Hawkins, one of the firms of attorneys for Appellant and Defendant. [721]

Witness my hand and the seal of said United States District Court this 9th day of December, 1947.

[Seal] /s/ AMOS P. DICKEY,
Clerk, U. S. District Court,
By /s/ O. F. PRATT,
Deputy.

[Endorsed]: No. 11809. United States Circuit Court of Appeals for the Ninth Circuit. Mission Corporation, a corporation, Appellant, vs. William G. Skelly, Appellee. Transcript of Record Upon Appeal from the District Court of the United States for the District of Nevada.

Filed December 9, 1947.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

United States Circuit Court of Appeals
for the Ninth Circuit

No. 11809

MISSION CORPORATION,

Appellant,

vs.

WILLIAM G. SKELLY,

Appellee.

Appeal from the District Court of the United States
for the District of Nevada

ORDER

Appellant's "application for order suspending interlocutory injunction pending an appeal from the granting thereof" is hereby denied.

/s/ CLIFTON MATHEWS,
/s/ WILLIAM HEALY,
/s/ HOMER T. BONE,
United States Circuit Judges.

[Endorsed]: Filed Dec. 12, 1947.

United States Circuit Court of Appeals
for the Ninth Circuit

No. 11809

MISSION CORPORATION, a Corporation,
Appellant and Defendant,

vs.

WILLIAM G. SKELLY,
Appellee and Plaintiff.

STATEMENT OF POINTS UPON WHICH APPELLANT RELIES AND DESIGNATION OF PARTS OF RECORD NECESSARY FOR CONSIDERATION

I.

Appellant, Mission Corporation, pursuant to Subdivision 6, Rule 19 of Rules of the United States Circuit Court of Appeals for the Ninth Circuit, makes and files the following statement of the points upon which it relies on this appeal, namely:

1. The court erred in not dismissing the action for failure of the appellee's complaint to state a claim within the jurisdictional amount of the court.

2. The court erred in not dismissing the action for failure of the appellee's complaint to state a claim upon which relief can be granted.

3. The court erred in ruling that the directors' meeting of Mission Corporation held on October 18, 1947, and the resolution adopted at such meeting approving the agreement of merger, were nullities.

4. The court erred in granting a preliminary injunction restraining the appellant Mission Corporation, from holding on December 6, 1947, or at any other time, a stockholders' meeting to consider and vote upon the said agreement of merger considered and acted upon by the appellant's Board of Directors on October 18, 1947, and further restraining the said appellant from proceeding further with said proposed merger.

5. The court erred in holding that Directors Kluth, Williams and Staples were disqualified, by reason of financial interest, from approving and signing the agreement of merger considered by the Board of Directors at its meeting on October 18, 1947.

6. The court erred in holding that Directors Kluth, Williams and Staples were influenced and controlled by Director Thomas A. J. Dockweiler.

7. The court erred in holding that the principal interest and purpose of Director Thomas A. J. Dockweiler on October 18, 1947, or at any time throughout the negotiation of said proposed merger, was to bring about the sale of stock of Pacific Western Oil Corporation owned by the Getty Interests for $68.00 per share.

8. The court erred in holding that the ratios of exchange for Pacific stock and the stock of the Remaining Stockholders of Mission provided for in the proposed merger agreement, were unequal or were arrived at without an appraisal of the constituent companies by an independent appraiser.

II.

Appellant, Mission Corporation, designates the parts of the record which it thinks necessary for consideration on the foregoing appeal, namely:

1. Motion to Dismiss
2. Amended Complaint (and All Exhibits)
3. Answer to Amended Complaint
4. Answers to Plaintiff's Interrogatories (includes both questions and answers)

5. Affidavits, including exhibits thereto attached, filed on behalf of the plaintiff, William G. Skelly, as follows:

(a) Affidavit of Achtschin, Leo A.
(b) Affidavit of Herndon, Chesley C.
(c) Affidavit of Hyden, Arch H.
(d) Affidavit of Skelly, William G., including letter of John P. Thatcher and telegram of Burton K. Wheeler.
(e) Affidavit of Stuart, Harold C.

6. Affidavits, including exhibits thereto attached, filed on behalf of the defendant, Mission Corporation, as follows:

(a) Dockweiler, Thomas A. J.
(b) Hammer, George A.
(c) Kluth, Emil
(d) Kravis, Raymond F.
(e) Kroupa, J.
(f) Krug, Charles F.
(g) Layton, Caleb S.
(h) Schimpff, Charles H.
(i) Staples, David T.

(A printed copy of Mission Corporation Notice of Meeting and Proxy Statement was annexed to and made a part of the Staples affidavit. It is omitted from the record designated to be printed as it is again included under Topic 7 (a) as "Plaintiff's Exhibit No. 1 in evidence." Appellant respectfully suggests that actual printed copies of the Mission Corporation Notice of Meeting and Proxy Statement and Sunray Oil Corporation Notice of Meeting and Proxy Statement hereinafter designated under Topic 8 (a), be considered in lieu of having these documents reprinted as a part of the record before the court.)

(j) Wasson, Harold J.

(k) Wright, Clarence H.

(l) Williams, Fero

7. Exhibits submitted in evidence by the plaintiff as follows:

(a) Plaintiff's Exhibit No. 1—Notice of Meeting and Proxy Statement of Mission Corporation marked by plaintiff's counsel.

(Appellant respectfully suggests that it be permitted to furnish the Clerk with 60 printed copies of the Mission Corporation Notice of Meeting and Proxy Statement, such copies to be marked identical with those included in the original certified record, and that they be accepted in lieu of having this document reprinted as a part of the record before the court.)

The items and pages are marked on the Clerk's copy as follows:

Item	Page	Item	Page
1	3	7	8
2	3	9	15
3	4	10	26
4	5	11	27
5	6	12	27
6	7	14	10

(b) Plaintiff's Exhibit No. 2—Minutes of Special Meeting of October 18, 1947, of Mission Corporation with letter signed by Bob Hawkins to W. G. Skelly.

(c) Plaintiff's Exhibit No. 3—Depositions of Thomas A. J. Dockweiler and George Franklin Getty II.

8. Exhibit submitted in evidence by the defendant as follows:

(a) Defendant's Exhibit No. A—Notice of Meeting and Proxy Statement of Sunray Oil Corporation.

(Appellant respectfully suggests that it be permitted to furnish the Clerk with 60 printed copies of the Sunray Oil Corp. Notice of Meeting and Proxy Statement, and that they be accepted in lieu of having this document reprinted as a part of the record before the court.)

9. Order and Findings on Application for Preliminary Injunction.

10. Motion for Supersedeas.

11. Order denying Motion for Supersedeas.
12. Notice of Appeal to Circuit Court of Appeals.
13. Bond for Costs on Appeal.
14. Certificate of Clerk, U. S. District Court.
15. This "Statement of Points Upon Which Appellant Relies and Designation of Parts of Record Necessary for Consideration."

Respectfully submitted by the undersigned attorneys for appellant and defendant Mission Corporation.

HAWKINS, RHODES &
HAWKINS,
/s/ ROBERT Z. HAWKINS.

By /s/ LESTER D. SUMMERFIELD.
ESQ.,
THOMPKINS, BOAL &
TOMPKINS,
ARTHUR M. BOAL, Esq.,

By /s/ ROBERT Z. HAWKINS.

Service of the Above and Foregoing, by copy, is acknowledged this 29th day of January, 1948.

WILLIAM G. SKELLY,
By /s/ WM. J. FORMAN,
Of Counsel for Appellee and
Plaintiff.

[Endorsed]: Filed January 30, 1948.

[Title of Circuit Court of Appeals and Cause.]

DESIGNATION BY APPELLEE OF ADDITIONAL PARTS OF RECORD

Appellee, William G. Skelly, through his counsel, designates the following additional portions of the Record and proceedings which he deems necessary to be contained in the Record of Appeal in this action:

1. Pages 16-29 of the Court Reporter's transcript of proceedings in the United States District Court, District of Nevada. (The pages referred to are as numbered in Designation of Appellee, as filed with the Clerk of the Circuit Court of Appeals December 10, 1947);

2. Pages 2, 3, 6 and 7 of Exhibit "C-1" to Plaintiff's Exhibit 1, being the balance sheet of Sunray Oil Corporation as of December 31, 1946, with notes thereto;

3. Pages 2, 3 and 4 of Exhibit "D-1" to Plaintiff's Exhibit 1, being the balance sheet of Pacific Western Oil Corporation and subsidiary company, as of December 31, 1946, with notes thereto;

4. Pages 2 and 3 of Exhibit "E-1" to Plaintiff's Exhibit 1, being the balance sheet of Mission Corporation as of December 31, 1946, with notes thereto;

5. Pages 2 and 3 of Exhibit "G" to Plaintiff's Exhibit 1, being the pro forma condensed consolidated balance sheet of Sunray Oil Corporation and wholly owned subsidiary, with notes thereto;

6. Order fixing time for hearing Application for Temporary Injunction (Page 25 of Appellant's original certified record as shown by Clerk's Index);

7. Bond for Temporary Injunction (Pages 705-707 of Appellant's original certified record as shown by Clerk's Index);

8. Appellant's Original Designation of Record (Pages 714-720 of Appellant's original certified record as shown by Clerk's Index);

9. Original "Designation of Appellee," Pages 1-3, as filed with the Clerk of the Circuit Court of Appeals December 10, 1947;

10. This "Designation by Appellee of Additional Parts of Record."

/s/ HERBERT W. CLARK,
/s/ JOHN P. THATCHER,
/s/ WILLIAM FORMAN,
/s/ VILLARD MARTIN,
/s/ GARRET LOGAN,
/s/ THEODORE RINEHART.
/s/ HAROLD C. STUART,
Attorneys for Appellee and
Plaintiff, William G. Skelly

Service of a copy of the foregoing additional Designation of Record and Proceedings on Appeal acknowledged this.....day of February, 1948.

.....

Attorneys for Appellant and Defendant, Mission Corporation.

[Endorsed]: Filed February 9, 1948.

No. 11,810

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

JOSEPH P. LYNCH,

Appellant,

vs.

JAMES A. JOHNSTON, Warden, United States Penitentiary, Alcatraz, California,

Appellee.

BRIEF FOR APPELLEE.

FRANK J. HENNESSY,
United States Attorney,

JOSEPH KARESH,
Assistant United States Attorney,
Post Office Building, San Francisco,

Attorneys for Appellee.

FERNAU WALSH PRINTING CO., SAN FRANCISCO

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No. 11,810

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

JOSEPH P. LYNCH,

Appellant,

vs.

JAMES A. JOHNSTON, Warden, United States Penitentiary, Alcatraz, California,

Appellee.

BRIEF FOR APPELLEE.

JURISDICTIONAL STATEMENT.

This is an appeal from an order of the United States District Court for the Northern District of California, hereinafter called the "Court below", discharging the writ of habeas corpus previously issued by it, and denying appellant's petition therefor. (Tr. 22-23.) The Court below had jurisdiction of the habeas corpus proceedings under Title 28 USCA, Sections 451, 452 and 453. Jurisdiction to review the order of the Court below denying the petition is conferred upon this Honorable Court by Title 28 USCA, Sections 463 and 225.

STATEMENT OF FACTS.

This is an appeal from an order of the Court below denying appellant's application for relief and discharging the writ of habeas corpus. The writ of habeas corpus was issued herein by the Court below pursuant to the order of this Honorable Court. (Tr. 12.) See

Lynch v. Johnston (CCA-9), 160 F. (2d) 950.

After the writ of habeas corpus issued, the Court below appointed counsel to appear on behalf of the appellant. (Tr. 11.) Thereafter the appellee filed a return to writ of habeas corpus (Tr. 14, 15) and the appellant filed a traverse to return to writ of habeas corpus. (Tr. 17, 18.) At the hearings, which were held pursuant to the writ of habeas corpus, appellant's testimony was taken and other testimony, and by stipulation of counsel, affidavits were received in evidence on behalf of the appellant and the appellee. (Tr. 34-133.) The Court below, after hearing the cause and submission of the same, filed the following order denying the application for relief and discharging the writ of habeas corpus:

> "The petition for habeas corpus of Joseph P. Lynch having been briefed, argued and submitted for decision and after complete hearing, the court finds that petitioner was represented by able counsel; that he entered a plea of guilty freely, voluntarily and intelligently; that he was afforded a fair and complete trial;
>
> Specifically the court finds that petitioner was duly represented by counsel appointed by the trial court during all stages of the proceedings; was duly arraigned before said court, knew the nature of the charge against him and competently,

intelligently, freely and voluntarily entered a plea of guilty to the charge contained in the indictment.

Accordingly, It Is Ordered that the petition for habeas corpus be, and the same hereby is Denied: and the writ of habeas corpus previously issued be, and the same hereby is Discharged.

George B. Harris
United States District Court.

October 17, 1947,
(Endorsed)
Filed: Oct. 17, 1947
C. W. Calbreath, Clerk."
(Tr. 26.)

CONTENTIONS OF APPELLANT.

Appellant contends in substance that:

(1) He was coerced into entering a plea of guilty.

(2) He was denied his right of the effective assistance of counsel before the trial Court.

CONTENTIONS OF APPELLEE.

Appellee asserts that:

(1) Appellant freely, voluntarily and intelligently entered a plea of guilty to the offense with which he was charged before the trial Court.

(2) Appellant was not denied his right of the effective assistance of counsel before the trial Court but was represented at all stages of the proceedings by able counsel.

ARGUMENT.

I.

APPELLANT FREELY, VOLUNTARILY AND INTELLIGENTLY ENTERED A PLEA OF GUILTY TO THE OFFENSE WITH WHICH HE WAS CHARGED BEFORE THE TRIAL COURT.

The appellant seeks to bring his case within the framework of *Waley v. Johnston,* 316 U. S. 101, 104, wherein the Supreme Court declared that

> "a conviction on a plea of guilty coerced by Federal law enforcement officers is no more consistent with due process than a conviction supported by a coerced confession."

The record, however, as elicited during the habeas corpus proceedings, is against him for it shows the following:

Appellant was indicted in the District Court of the United States in and for the Middle District of Pennsylvania in Criminal Cause No. 9692 for the crime of murder. The alleged offense grew out of a killing at the United States Penitentiary at Lewisburg, Pennsylvania, where the appellant was then an inmate. After his indictment, and on or about December 6, 1938, petitioner requested the appointment of counsel, and his request was granted on December 9, 1938. (Appellee's Exhibit "F", Tr. 21.) Petitioner had numerous consultations with his counsel, Cloyd Steininger, Esq., of Lewisburg, Pennsylvania, before pleading guilty to second degree murder. (Affidavit of Appellant's counsel—Appellant's Exhibit "2"—Tr. 21.) This plea was accepted with the approval of the Attorney General. (Appellant's Exhibit "G"—Tr. 21.)

Appellant admitted that he never told his counsel that the victim allegedly made improper advances toward him, because he did not want his fellow inmates at the penitentiary to know this fact.

In his opening brief, at page 12, appellant asserts that prison officials, and impliedly Warden Hill, then the Warden of the United States Penitentiary at Lewisburg, Pennsylvania (now a member of the Board of Prison Terms and Paroles for the State of Pennsylvania), coerced him into pleading guilty. Appellant never made this allegation in his petition or during the habeas corpus proceedings, it being appellee's impression that during these proceedings appellant went only so far as to say that he was coerced into making a "confession" by Warden Hill. Here it should be noted that appellant testified that he bludgeoned the victim and rendered him unconscious, although he stated that he was not sure that the victim died as a result of his violent assault. (Tr. 81-82.) Yet, in connection with this allegedly coerced "confession", the Assistant United States Attorney who prosecuted the case denied that the said "confession" was produced during the proceedings before the trial Court. On the contrary, he asserted in an affidavit, received by stipulation in evidence in these proceedings in lieu of his deposition, that:

> "During the course of the investigation a statement had been made by the defendant to a Special Agent of the Federal Bureau of Investigation. Counsel for the defendant was fully apprised of this statement. Such statement, however, did not in any wise affect the case, inasmuch as it was

not introduced into evidence during the proceedings nor at any time presented to the court, and, consequently, had no bearing whatsoever on the proceedings and could not in any wise have influenced the Court. This 'Statement' was in fact, intentionally withheld in that I had anticipated that the defendant, after a plea of guilty and in the course of the investigation or hearing which was then being conducted by the Court, might take the stand and make statements in extenuation of the crime, and it was my intention to use such statement only in the event that cross-examination became necessary, to which said statement might be pertinent. Inasmuch as he did not take the stand, the statement was never used. I at the time had a further reason for withholding the same, in that I felt that it might require the calling of some of the prisoners, and in penitentiary cases it was our practice, in fairness to such prisoners, to refrain from calling upon them to testify if it could be avoided. Inasmuch as I had been Assistant United States Attorney since August, 1921, and had been in charge of all penitentiary matters which required attention in court, such as any crimes committed and any habeas corpus proceedings instituted, I was fully aware of the problems involved in the administrative as well as in the Court proceedings. * * *

"Among the witnesses called prior to the imposition of sentence was Henry C. Hill, at that time the Warden of the United States Penitentiary, Lewisburg, Pa., and I have no recollection whatsoever of his having made any reference to the so-called statement or confession which the defendant had made to an Agent of the Federal

> Bureau of Investigation. I can state definitely that the contents of the statement were not given and the statement itself was in my files and was not at any time produced. * * *"

Furthermore, the appellant has never testified that it was the allegedly coerced "confession" which caused him to plead guilty to second degree murder. In fact he testified to the contrary.* What, then, was the reason for entering such a plea? Was it because, as he testified, he did not desire to disclose the alleged misconduct of the victim toward him, or was this idea an afterthought, his real motive being to avoid a trial which he feared might result in his being convicted of first degree murder. The trial Court prosecutor, in the concluding words of his affidavit, has furnished us with the logical answer in declaring that:

> "At no time prior to defendant's appearance in Court did I either see or talk to him. My discussions of the case were entirely with his counsel and I did not urge the entry of the plea of guilty. On the contrary, I had some reluctance in agreeing to a plea less than that of murder in the first degree, since it was my personal opinion that the murder was of a brutal nature and my evaluation

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*"Q. Why did you enter a plea of guilty to second degree murder?

A. I entered a plea of guilty to second degree murder to keep from telling the true story of what really took place.

Q. You did not enter a plea of guilty to second degree murder because of any confession you had given?

A. No sir." (Tr. 115, lines 20-25).

* * * * * * *

"Q. The confession had nothing to do with your entering a plea of guilty to second degree murder, did it?

A. No, sir." (Tr. 116, lines 21-23).

of the facts and the evidence was such that I felt that the chances on trial of obtaining a verdict of murder in the first degree, were excellent." (Appellee's Exhibit "G", supra.)

Appellee is of the opinion that the appellant's position here is analogous to the position of an applicant for a writ of habeas corpus described by the Circuit Court of Appeals for the District of Columbia in *Dorsey v. Gill,* 148 Fed. (2d) 857, 876, 877, wherein it was said:

> "* * * No confession was received or even offered in evidence. Appellant was under no coercion when he appeared in Court. There, under the protection of the judge, and with the advice of counsel, he could have stood trial and defied the police force. He did neither, and it seems apparent that the allegations contained in his petition constitute an afterthought, designed to secure a retrial of his case. * * *"

See also

Waley v. Johnston, 139 Fed. (2d) 117, 121, certiorari denied 321 U. S. 779,

decided subsequently to the decision of the Supreme Court in the *Waley* case, supra, on which appellant relies, both cases which can give no comfort to the petitioner, wherein this Honorable Court declared:

> "The doctrine of McNabb v. United States, supra, 318 U.S. 322, 63 S. Ct. 608, 87 L. Ed. 819, is confined to the situation where the confession is introduced in evidence. It may not be pressed to the extent that a confession procured as here, but not introduced against him, can give the

defendant an immunity from the result of his pleas of guilty."

The Court below in its order denying appellant's claim for relief, made certain findings, among which was the following:

"* * * that petitioner * * * entered a plea of guilty freely, voluntarily and intelligently; * * *" (Tr. 21.)

The record of the habeas corpus proceedings clearly shows that this finding is supported by the evidence, and accordingly it should not be disturbed, particularly in view of the fact that appellant has previously been convicted of another felony (Tr. 77) and his credibility is thus impeached.

O'Keith v. Johnston (CCA-9), 129 F. (2d) 889, 891.

II.

APPELLANT WAS NOT DENIED HIS RIGHT OF THE EFFECTIVE ASSISTANCE OF COUNSEL BEFORE THE TRIAL COURT BUT WAS REPRESENTED AT ALL STAGES OF THE PROCEEDINGS BY ABLE COUNSEL.

In contending that he was denied his constitutional right of effective assistance of counsel before the trial Court, appellant argues that his case is governed by the decision of the Supreme Court in

Glasser v. United States, 315 U. S. 60.

In support of this contention, appellant claims that he was entitled, under Title 18 USCA, Section 563, to

have two attorneys appear in his behalf before the trial Court rather than one attorney because of the fact that he had been indicted for a capital offense. It should be noted, however, that appellant did not advance this particular argument in his opening brief but did so only in his "Assignment of Errors". (Tr. 28.) But regardless of where appellant advanced this particular argument, it is clearly without merit.

A reading of the language of this statute indicates that it was only mandatory upon the Court to appoint one attorney for the petitioner, and discretionary with him whether or not to appoint two attorneys. The result would, of course, be the same even if petitioner had requested the appointment of two attorneys to appear for him, which he did not do, because Title 18 USCA, Section 563, reads in pertinent part as follows:

> "Every person who is indicted of treason or other capital crime shall be allowed to make his full defense by counsel learned in the law; and the court before which he is tried, or some judge thereof, shall immediately, upon his request, assign to him such counsel, not exceeding two, as he may desire, * * *"

In further support of his contention that his case is within the class of cases governed by the decision in *Glasser v. United States,* supra, appellant complained in his petition for writ of habeas corpus (Tr. 3-4), although he did not urge it in his opening brief, that he was misled by his attorney into entering a plea of guilty, thinking he would get a ten year sentence in-

stead of a twenty year sentence. Appellant also alleged in his petition, although he did not urge it in his opening brief, that the prosecutor misinformed the trial judge that the minimum penalty for second degree murder was twenty years instead of ten years (Tr. 4), inferring thereby that if the trial judge had actually known what the minimum sentence was, he would have imposed the ten year sentence. This complaint, of course, has no foundation in fact or in law. The facts of this aspect of the case as stated by the trial Court prosecutor in his affidavit as above referred to are as follows:

> "With reference to any allegations that the Court was unaware of the minimum penalty, it was my opinion at the time that the facts in the case would sustain a verdict of murder in the first degree, and during the numerous conferences on the case at which I was present, the various facts were fully discussed with the attorney for the defendant, who sought to obtain our consent to the entry of a manslaughter plea. We reviewed the case with the office of the Attorney General and thereafter informed Mr. Steininger, counsel for the defendant, that in order to save the time and expense of a trial, a plea less than first degree would be accepted but that manslaughter carried only a maximum penalty of ten years and that it was our intention to urge upon the Court the imposition of a sentence of at least twenty years, and accordingly we did not consent to the entry of any plea less than that of murder in the second degree.
>
> Counsel for the defendant had had a long experience in the trial of cases and I know person-

ally, from our various discussions in this case, that he was fully aware of the penalties provided in the statutes for the various degrees involved in the crime charged.

In connection with the imposition of sentences in criminal cases in this District, I instituted the practice of handing to the Court at the time a defendant was before the Court for sentence, a copy of the statute involving the particular crime. In the types of crimes frequently occurring mimeographed copies of the statutes had been prepared and a copy thereof placed in each file and submitted to the Court at the time of sentence. In this particular case, however, which involved the crime of murder which rarely arises in the Federal Courts, the statute was typed. The Court, at the time of imposing sentence, had before him the pertinent statutes upon a typewritten sheet, a carbon copy of which is still in the Joseph P. Lynch file in the office of the United States Attorney.

In connection with the imposition of sentence, and as I had already in our conferences indicated to counsel, I urged upon the Court that, in view of the nature of the offense and all the circumstances surrounding it, the full penalty of twenty years should be imposed. This had no reference to the minimum penalty and it was not at any time referred to as the minimum penalty. As a matter of fact, I was intentionally urging the maximum and both counsel for the defendant and I knew what the statute provided as to minimum and maximum penalty for second degree murder, and the Court at the time of such discussions in Court and at the time of the imposition of the sen-

tence, actually had before him on the bench, a copy of the statute above referred to, fully setting forth the penalties providing for second degree murder.

I can personally state that defendant's counsel, Mr. Steininger, was fully aware of the provisions of the statute pertaining to this offense, inasmuch as during the period from this appointment, December 8, 1938, until the disposition of the case on January 24, 1939, he discussed these statutes repeatedly with myself and other Government counsel in my presence, and sought every possible angle of defense for his client, and discussed the penalty section of 18 USCA 454, as well as the definition of the crimes of murder, first and second degree and manslaughter, in 18 USCA Sections 452 and 453."

(Exhibit "G", supra.)

Finally, this latter complaint, as already indicated, also has no basis in law, as the Circuit Court said, in *United States v. Lynch* (CCA-3), 132 F. (2d) 111:

"The sentence of 20 years penal servitude was within the competency of the Court to impose. Criminal Code, Section 275, 18 USCA 454. The suggestion that the trial Court intended to impose the minimum sentence (10 years) prescribed by the statute for second degree murder, but mistakenly named 20 years * * *. In any event, the term of the sentence, so long as it is within the prescribed limits fixed by the relevant statute, is not open to review on appeal."

To the same effect see

Widener v. Harris (CCA-4), 60 Fed. (2d) 956, 957.

In a further vain attempt to bring his case within the framework of *Glasser v. United States,* supra, appellant seeks to brand his counsel, Cloyd Steininger, a practicing attorney since 1905, as incompetent. He complains that "the attitude of Steininger was one of disinterest." (Appellant's opening brief, page 5, lines 4, 5.) Yet in the same complaint against the alleged "disinterest" of his counsel, he states that counsel "visited him about ten times at the penitentiary". (Appellant's opening brief, page 5, lines 5, 6.) Certainly this is no mark of disinterest. If anything, it is a sign of great interest and great devotion to duty on the part of an attorney for his client. And here it should be added that appellant's attorney stated in his affidavit offered by appellant and received by stipulation in evidence on his behalf that he, Steininger, visited the said appellant not ten times, but twenty-five times, between the day of his appointment and the day of the trial. (Appellant's Exhibit "2", supra.)

Appellant also complains that he did not request the appointment of counsel, but it was forced upon him. This is contrary to the record, which shows that counsel was appointed at appellant's request. (Appellee's Exhibit "F", supra.)

As for appellant's other complaints, that his counsel was too elderly to effectively represent him and that his counsel hesitated to accept appointment for him,

appellee believes they are so completely unfounded and so patently untenable as to call for no further comment from him. Yet so pointed was an observation made by the Court in *Dorsey v. Gill,* supra, and so peculiarly appropriate for the situation which obtains here, that appellee is constrained to set forth its language at this point:

> "Every one who is acquainted with the realities of practice knows the desires of some convicted persons to have their cases tried over again and their frequent repudiation of counsel after their hopes for acquittal or for lenient punishment have failed to materialize. It is easy for such a person to rationalize his own wishful thinking—together with hopeful comments of counsel—into a structure of promises, coercion and trickery; to assume incompetency and disinterest or worse, upon the part of counsel. But mere general assertions of incompetency or disinterest do not constitute a prima facie showing required by the statute to support a petition for habeas corpus. District attorneys and assigned counsel are officers of the court; licensed to practice, upon proof of character and fitness to perform professional duties. There is a presumption of proper performance of duty by each of them, which requires much more than the allegations of the present case to set the procedure of habeas corpus in motion."

The following words of the Supreme Court in *Johnston v. Zerbst,* 304 U. S. 458, 468, are likewise particularly appropriate herein:

> "It must be remembered, however, that a judgment can not be lightly set aside by collateral

> attack even on habeas corpus. When collaterally attacked, the judgment of the court carries with it a presumption of regularity."

Appellee has deliberately chosen to ignore the argument of appellant that his counsel had "difficulty" interviewing witnesses on his behalf for the reason that here is no complaint that his counsel was *prevented* from interviewing witnesses nor any testimony offered that appellant was denied compulsory process of witnesses essential for his defense. Thus no ground is stated here cognizable in habeas corpus and accordingly it is unnecessary for appellee to dispute, although he believes the allegation that Government officials made it "difficult" for counsel to interview witnesses, can be successfully disputed.

As above indicated, appellant has attempted to bring his case within the framework of *Glasser v. United States,* supra. While the decision in the *Glasser* case seems to indicate that the defendant is entitled to effective assistance of counsel, it does not follow that the mere fact that appellant was dissatisfied with the sentence imposed upon him by the Court, shows he did not receive competent legal assistance. In the *Glasser* case the Supreme Court took great pains to point out that Glasser was in fact deprived of competent and effective assistance of counsel by the Court's appointment of his counsel to represent another defendant. Instances occurring during the trial were referred to by the Court to illustrate the prejudice of Glasser through his attorney being requested to represent two clients. There is nothing in the record of our case at

bar which shows that anywhere in the proceedings before the trial Court was the appellant prejudiced by the services rendered him by his counsel or that his counsel did not in fact defend him to the best of his ability.

In view of the foregoing it is obvious why the Court below in its order denying appellant's application for writ of habeas corpus, made this additional finding:

> "* * * that petitioner was represented by able counsel; * * * that he was afforded a fair and complete trial; * * *"
> (Tr. 21.)

SUMMARY.

It is apparent that the trial Court has jurisdiction over the person of the appellant and the offense to which he pleaded guilty; that the sentence which the petitioner is now serving is a valid sentence now in full force and effect; that petitioner was not denied due process of law at any stage of the proceedings before the trial Court, and that petitioner is in the lawful custody of the appellee, the Warden of the United States Penitentiary at Alcatraz Island, California.

CONCLUSION.

It is respectfully urged that the decision of the Court below is correct and should be affirmed.

Dated, San Francisco,
February 25, 1948.

Respectfully submitted,

FRANK J. HENNESSY,
United States Attorney,

JOSEPH KARESH,
Assistant United States Attorney,

Attorneys for Appellee.

No. 11812

In the United States Circuit Court of Appeals for the Ninth Circuit

LEONTY SAVOROFF, APPELLANT

v.

THE UNITED STATES OF AMERICA, APPELLEE

APPEAL FROM THE DISTRICT COURT FOR THE TERRITORY OF ALASKA, THIRD DIVISION

BRIEF FOR THE APPELLEE

J. EARL COOPER,
Assistant United States Attorney,
Anchorage, Alaska,
Attorney for Appellee.

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In the United States Circuit Court of Appeals for the Ninth Circuit

No. 11812

LEONTY SAVOROFF, APPELLANT

v.

THE UNITED STATES OF AMERICA, APPELLEE

APPEAL FROM THE DISTRICT COURT FOR THE TERRITORY OF ALASKA, THIRD DIVISION

BRIEF FOR THE APPELLEE

STATEMENT OF THE CASE

On the 15th day of October, 1946 the grand jury filed in the District Court for the Territory of Alaska, Third Judicial Division, an indictment charging the defendant with violation of Section 4760, C. L. A., 1933. The charging part of the indictment is correctly set forth in the opening brief for appellant (pp. 1–2). After trial by jury appellant was convicted of manslaughter and after a motion for judgment of acquittal and motion for a new trial had been denied, appellant was sentenced to imprisonment for four years. This appeal in forma pauperis followed.

JURISDICTIONAL STATEMENT

The statement of jurisdiction is properly set forth in appellant's opening brief (p. 4).

STATEMENT OF FACTS

While a statement of the case is set forth in appellant's brief (pp. 4–8), it is deemed advisable to include in this brief a statement of facts which embraces a few more of the pertinent facts contained in the record. The appellant, Leonty Savoroff, and his wife, Nellie Savoroff, the deceased, were Alaskan natives residing in the little native village of Nikolski. During the period of their married life the appellant and his wife, together with other natives of Nikolski village, were evacuated to Ward Lake near Ketchikan (R. 115). During that period of time appellant and his wife were not getting along too well due to the fact that his wife would sometimes disappear for several days from their home, on which occasions she would sometimes overindulge in the use of liquor, and that at such times her disposition was bad and she would resort to screaming and hollering when defendant would attempt to bring her home (R. 115–116). The appellant and his wife also had many quarrels after their return to the village of Nikolski at which times they would engage in striking each other (R. 145). Defendant had been known to beat up his wife a number of times (R. 95).

On September 28, 1946, the government vessel *Penguin* called at the village of Nikolski for the purpose of returning several of the village natives who had been engaged in sealing activities in the Pribilof

Islands. The returning natives brought with them a quantity of whiskey which they had purchased at Unalaska when the *Penguin* had stopped there en route to Nikolski. Among the returning natives were Willie Ermeloff, who had, himself, bought five quarts of whiskey (R. 117). A number of the natives engaged in drinking the said liquor, including the appellant and his wife, Nellie.

Harvey Bell, manager of the Aleutian Livestock Company, which was a company engaged in the raising of sheep at Nikolski, had resided there for approximately twenty-six months and was well acquainted with most of the villagers (R. 13). Bell, who was in the village on the night in question, attempted to act as a peacemaker in various fights and to help in any way he could to take care of those who had overindulged. His first encounter was with a native whose nickname is Sambo and who was the husband of Christine Dushkin. Sambo was quite drunk and was looking for his wife. He had previously torn part of her clothing off and she had gone up to the Bell's ranch (R. 13). This encounter with Sambo took place at approximately 8:00 or 8:30 in the evening, at which time Sambo broke the kitchen window in the home of Leonty Savoroff. He was becoming so unruly that it was necessary for Bell to strike him and knock him out.

Following this altercation, Bell had to take care of one of his employees, Jake Cheresin, who was also drunk, by taking him home and inducing him to go to bed (R. 14). Upon leaving the home of Jake Cheresin, Bell passed by the appellant's house and

heard a rumpus. There was a lot of screaming and hollering and fighting. Upon entering the appellant's home he discovered Nellie Savoroff with her baby on the floor under the table with the appellant on top of her and apparently choking her, as he had hold of her neck. Bell removed the appellant from his wife, in which struggle the appellant twisted the stove out away from the wall (R. 24), but Bell finally succeeded in breaking his hold and getting him outside, at which time he had a talk with appellant and appellant promised to behave. At about this time Mrs. Bell appeared for the purpose of getting some clothes for Christine Dushkin and her baby (R. 15). The next time Bell saw Nellie was the following day, at which time she was prepared for burial. The body indicated that it had been beaten pretty badly, having bruises on the temple, a cut across the nose, discoloration of the breasts and the appearance of a general beaten-up condition. There were also what appeared to be slight finger marks on her throat (R. 16). Bell fixed the time of the fight between Leonty and his wife, to which he testified, as approximately 9:30 or 10:00 (R. 18). Bell had had only a couple of drinks and was not drunk. The fact of his sobriety was also verified by Mrs. Bell (R. 28). Bell's reputation for sobriety was further testified to by Donald Pettit, the young Coast Guardsman stationed at Nikolski. (R. 148).

Mrs. Eva Cheresin, the mother of Nellie Savoroff, testified that her daughter Nellie had had a little drink and had left the mother's home about 10:00 in the evening of September 28, 1946 (R. 46) and that the

appellant left about half an hour later with the baby (R. 47), which was about ten months old (R. 153). Mrs. Cheresin testified further that she next saw her daughter the following day on the floor near the bed in the home of appellant and deceased, at which time she observed that Nellie's hair was all pulled out from the skull, there was a bruise on the temple side of the face and bruise all across the chest (R. 42–43). The appellant told Mrs. Cheresin that he had stayed at home all night with the baby (R. 48).

Fannie Pletnikoff Burton testified that she heard the discussion between Harvey Bell and Sambo (R. 32) and she could tell that Sambo was drinking but couldn't tell if Bell was (R. 35). About 10:30 in the evening she heard crying at Leonty's and she thought it was a woman crying (R. 37). She also heard a disturbance as if chairs were falling around, and the crying continued from 11:00 to 2:00 a. m. (R. 152–153). About 2:00 a. m. Joe Brisnikoff broke the window at Oxenia Krukoff's place where Fannie was staying (R. 33).

Frederick Frohbose, an agent of the F. B. I., who investigated this case several days after the alleged killing, testified that he examined the body of Nellie Savoroff and discovered a bruise on the left temple extending down to the cheek, the left eye swollen, a deep gash over the bridge of the nose, marks around the mouth, faint marks of discoloration on the neck and about a two-inch swelling above the left breast (R. 58). He further testified that the appellant admitted having had the first fight with his wife, that he had had a lot to drink, and that after engaging in the

second fight his wife ended up by the bed. He thought she was asleep and put a blanket over her. He stated that he did not mean to kill his wife. When he woke up, his wife was still on the floor where she had fallen (R. 87–89). Mr. Frohbose further testified that at the time of the investigation the stove was not in its normal position; that it was askew (R. 57).

L. Verne Robinson, Deputy United States Marshal, also testified to the statement made by the appellant that he did not mean to kill his wife; that he did not mean to kill her because he was drunk. When asked what construction he placed upon that statement he testified that he assumed the appellant meant he was fighting with her and she was dead and he didn't mean to kill her (R. 93–94). He further testified in response to questions by the appellant's attorney that he heard that appellant had beaten his wife up a number of times and that she was badly bruised on various occasions.

Donald Pettit, the young Coast Guardsman stationed at Nikolski, testified that on the morning of September 29, 1946, the appellant requested him and Mr. Williams to come up to his house. This was about 8:00 a. m. The appellant's eyes were bleary and he smelled pretty strongly of liquor. Appellant stated he thought his wife had been poisoned. When they went up to the house they found the body lying at the foot of the bed face down and stiff as a board. Her hair was in a mess (R. 38–39).

The appellant, Leonty Savoroff, testified generally as to his activities upon the evening in question; that

he had only had about eight shots; that he wasn't drunk and remembered everything. He further testified that he had no recollection of Harvey Bell's being at his home that evening nor of having promised Harvey Bell to behave himself (R. 140) and that he had no recollection of having a fight with his wife. He testified that upon arriving home from his mother-in-law's place he found his wife on the floor and didn't want to wake her up because he didn't want her to go out and drink any more (R. 141). He denied that he had told Mr. Frohbose that he had hit his wife and denied that he said he didn't mean to kill his wife (R. 138). He testified that Feddie Krukoff came into his house early that morning but denied having had any drinks with Feddie. However, John Fletcher, United States Commissioner at Unalaska, who conducted the inquest into the death of Nellie Savoroff, testified that the appellant was sworn in as a witness at said inquest and testified that he remembered promising Bell he would behave himself. He also testified that both he and Feddie Krukoff had engaged in drinking on the morning in question.

The testimony of Willie Ermeloff, brother-in-law of the appellant, and Christine Dushkin, sister of the appellant, was almost in its entirety directed to the discrediting of the testimony of the witness Harvey Bell in that they testified that Harvey Bell was drunk on the evening of September 28 (R. 109, 128). These two witnesses also testified as to Emil Cheresin's having a swollen hand the next day (R. 110, 119). Both Christine Dushkin and Willie Ermeloff admitted hav-

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ing discussed the case with each other and with the appellant (R. 115, 128).

Dr. Lewis G. Allen, who had heard all of the testimony in the case, stated that the bruises and condition of the body testified to by the witnesses could have been the cause of death. (R. 156.)

ARGUMENT

I

There was no error on the part of the trial court in overruling defendant's motion for a new trial

After a trial by jury the appellant was convicted of the crime of manslaughter. In his argument appellant contends that the Court should have granted his motion for a new trial in that (a) there was not sufficient evidence to establish the corpus delicti, and (b) if there was sufficient evidence to establish corpus delicti, there was not sufficient evidence to find the defendant guilty of the crimes charged.

That corpus delicti must be proved beyond a reasonable doubt before a person can be convicted of a crime is elementary. It is sufficiently established that in homicide cases corpus delicti consists of two elements, to wit: the fact of death and the criminal agency. However, it is also a well-established principle of law that the elements in the corpus delicti may be proven by circumstantial evidence.

Wharton's *Criminal Evidence,* 11th Edition, Volume II, page 1507:

> The general rule in homicide is that the criminal agency—the cause of death, the second element of the corpus delicti—may always be

> shown by circumstantial evidence. Criminal agency is sufficiently shown where a dead body is found with injuries apparently sufficient to cause death under circumstances which exclude inference of accident or suicide.

Page 1508:

> Criminal agency is established by proof of wounds which shortly afterwards were followed by death. *People* v. *Holmes,* 50 Pac. 675. *U. S.* v. *Wiltberger,* Federal Cases No. 16,738.

In the same text at page 230 we find the following language:

> The finding of the dead body establishes the corpus. The finding of such body under circumstances that indicate a crime indicates the delicti or felonious killing.

In Underhill's *Criminal Evidence,* 4th Edition, page 21, Section 18 we find the following:

> No general rule can or should be laid down as to what constitutes proof of circumstances in any particular case. Each case is a rule unto itself and is to be determined upon its peculiar circumstances, but all of the circumstances as proved must be consistent with each other and they are to be taken together as proved.

Appellant contends that there is no evidence as to the cause of the death of Nellie Savoroff. However, an examination of the record does not support that contention. Harvey Bell testified that earlier in the evening on the day of the alleged crime, his attention was attracted to noises coming from the appellant's

house, indicating that there was a fight going on inside. Upon entering he found that Nellie Savoroff was lying under the table and that Leonty, the appellant, was on top of her and fighting her and apparently choking her because he had hold of her neck; that Bell finally succeeded in separating the two. The following day, he testified, he saw the body of Nellie Savoroff laid out for burial; that at that time he observed that "her temple was all bruised and swollen and she had been beaten up pretty bad and she had a bad laceration—cut—across her nose. Her breasts were all discolored where she had been beaten. She was just in a general beat up condition, plainly speaking." (R. 15–16).

Fannie Pletnikoff Burton testified that on the evening in question she heard crying coming from the house of appellant Leonty Savoroff, (R. 33) and that she first heard the crying about eleven o'clock P. M. and that it could be Nellie's but she wasn't sure. Later, under redirect examination she testified that she thought it was a woman crying, that it sounded more like a woman than a baby's voice (R. 37).

Donald Pettit testified that at approximately eight A. M. on the morning of September 29 he went to the home of the appellant, that he saw the body of the deceased lying in the bedroom by the foot of the bed, that the body was face down and stiff as a board and that her hair was in a mess (R. 38–39). Pettit further testified that there was no doctor in the village (R. 39).

Mrs. Eva Cheresin, the mother of the deceased, testified that she also saw Nellie on the morning in question

and that at the time she saw her, the deceased was on the floor with covers over her and that she removed the covers, that she felt the body and it was cold, and that with the assistance of other women she prepared the body for burial. She further stated that the side of the deceased's face was bruised and her chest had bruises on it and that her hair was pulled out of her skull, that there was a bruise at the left temple at the side of the face and below the temple there was a bruise, that the bruise was all across her chest.

Fred Frohbose, an agent for the Federal Bureau of Investigation, who arrived in Nikolski about October 3, testified that he examined the body of the deceased, at which time it was laid out as prepared for burial at the Savoroff home, and that he observed a bruise on the left temple which extended down to the cheek, the left eye was swollen, there was a deep gash over the bridge of the nose. There also seemed to be some marks around the mouth and very faint marks on the neck. There appeared to be a discoloration of the neck. Above the left breast there seemed to be approximately a two-inch swelling that was not normal (R. 57–58).

Dr. Allen, who was present during all of the testimony, stated that blows sufficient to cause the bruises, testified to by the witnesses, on the body of the deceased, were sufficient to cause death (R. 156).

The foregoing testimony as to the condition of the deceased's body was certainly sufficient to establish the fact that death was caused through the criminal agency of another person. It certainly could not be seriously contended that the wounds appearing on the

body of the deceased were self-inflicted. Appellant, in his argument, states that accidental death could be argued, but he makes no serious contention on this point and such contention, if made, would be contrary to the evidence. It is true that Dr. Allen testified that it was possible that a woman, while drinking, could fall and strike her head and that death could result, and he further answered in response to a question by counsel for appellant that it was possible that death could be caused by considerable consumption of large quantities of liquor. But there is no evidence to support either of these theories. On the contrary, the only evidence as to the sobriety of the deceased was that of Eva Cheresin, the deceased's mother, who testified that at the time deceased was at Mrs. Cheresin's, she had only a little drink (R. 49).

Nowhere in the record does it appear, either by inference or otherwise, that Nellie Savoroff had consumed sufficient liquor to bring about a condition that would cause death, so that the suggestion made by counsel as to other causes of death other than through criminal agency are based purely on speculation. That fact being true, there was ample circumstantial evidence from which the jury could draw an inference that a crime had been committed.

Underhill's *Criminal Evidence,* 4th Edition, page 45, Section 37, we find this language:

> Corpus delicti and all the elements thereof may be proved by circumstantial evidence, from which the jury may reasonably infer that a crime has been committed. Such evidence must exclude every reasonable hypothesis except guilt

> and be convincing to a moral certainty, and such proof of corpus delicti must be the most convincing and satisfactory proof compatible with the nature of the case. The order in which the different material facts are introduced is unimportant when showing corpus delicti, but circumstances and each particular circumstance need not be conclusive.

In the same work at page 1069, Section 546, we find this language:

> There is no presumption of the cause or manner of death. The cause and manner of death are always relevant and material in the prosecution for homicide. The cause of death may be proved by circumstantial evidence. If the corpus delicti is proved, it is not necessary to show the particular manner in which the killing occurred.

Vol. 26, *American Jurisprudence,* Homicide, Section 500, page 506:

> Ordinarily it is within the province of the jury to pass upon the sufficiency of the evidence, circumstantial or direct, offered to prove the corpus delicti. *Jordan* v. *State,* 142 Southern 665. *Ausmus* v. *People,* 107 Pac. 204. *Levering* v. *Commonwealth,* 117 Southwestern 253. *State* v. *Barnes,* 85 Pac. 998.

Section 462, page 476:

> According to modern authority, however, direct and positive evidence is not essential. It is now well established that aside from statutory requirements the elements constituting corpus delicti in a homicide case may be sufficiently proved by presumptive or circumstan-

tial evidence where that is the best evidence obtainable. *State* v. *Farnham,* 161 P. 417. *State* v. *Gillis,* 53 Southeastern 487.

Section 326, page 376:

> The state, in a homicide case, in discharging the burden upon it of proving the corpus delicti, may, according to the weight of authority, where direct evidence is not available, establish the elements of the corpus delicti including the fact of the death of a person alleged to have been murdered, as well as the criminal agency of the accused and the identity of the deceased by circumstantial evidence which tends to establish the fact of death and the agency of accused in causing death.

In the case before us, an examination of the record, of course, supports the fact that the death of Nellie Savoroff had occurred, and appellant makes no contention to the contrary.

In *Gibson* v. *Territory,* Supreme Court of Arizona, 68 Pac. Reporter 540, in which case the deceased was not attended by a physician and no autopsy was held, the Court stated:

> That death was produced by criminal act of the appellant was strong presumptive evidence. There was the proof of facts and circumstances from which the criminal agency could be justly inferred. The law permits it to be so established for, as observed by an eminent jurist, "Until it pleases providence to give us the means beyond those our present facilities afford of knowing things which occur in secret, we must act on presumptive proof or let the worst crimes go unpunished."

State v. *Burner,* Supreme Court of Oregon, 85 Pac. 998.

> The consumption of a human body by fire does not necessarily repel an inference of suicide or of an unintentional death, for the dissolution may have been caused by purposely leaping or accidentally falling into a fire or by being unable to escape from a burning building. So too the human body may be destroyed by that means after death had resulted from natural causes. The finding of the remains of a healthy body like Graham in a burning log heap where escape was possible in case contact with the fire was accidental and where probably immediate intense pain resulting from the flame would cause an abandonment of an attempt of self-destruction, must necessarily repel every inference of death by means of such a fire.

Choate v. *State,* 160 Pac. 34.

> To prove the corpus delicti is a very simple matter. If a dead body is found with marks of violence upon it or other circumstances that indicate that deceased came to his or her death by unnatural or violent means, the proof of such fact established the corpus delicti in a murder case.
>
> Direct and positive proof is not essential to establish the corpus delicti but it may be proved by circumstantial evidence and when it is proved by circumstantial evidence, the question should be submitted to the jury along with the other questions of fact in the case as to whether or not the State has established the corpus delicti beyond a reasonable doubt.

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Thompson v. *State,* 42 Southwestern 974.

> It is true that the wound was not probed but the result and effect of said wound are sufficiently manifested by the fact that coincident with its infliction the deceased who was evidently up to this time a strong and healthy man immediately collapsed and fell as though having received a fatal stroke. To say that this wound was not the immediate and proximate cause of death of the deceased it occurs to us would be puerile.

Mayfield v. *State,* 49 Southwestern Reporter 742.

> It was suggested in argument that no medical expert testified that the death resulted from the wound and that on this account the proof is insufficient to render a conviction. The proof is that up to the time the deceased received this wound he was in good health and able to engage in his usual occupation. It is not suggested in the proof that he died from any other cause or that his death could have been super-induced by any other cause. We held in the case of *Lemons* v. *State,* 97 Tennessee 560, 37 Southwestern 552, a capital case, that it is not essential that the state should, in a murder trial, prove by expert testimony that the death resulted from the wound when there is no suggestion of death from any other cause and the deceased is shown to have been previously in good health and that he received proper medical treatment.

Parks v. *State,* 63 Southwestern (2) 301.

> With reference to these exhibits, there was given testimony by persons familiar with the scene of the tragedy which testimony was avail-

able to the jury in forming their conclusions with reference to whether the tragedy was due to accident or criminal agency. The photographs make evident the fact that where the place it was claimed the deceased was fishing there was a ledge of rock covered by a few inches of water which extended out into the lake for a considerable distance before reaching the point where the water was deep. From this testimony, together with exhibits attached, the jury was able to obtain a more accurate knowledge of the conditions at the time of the tragedy than can be portrayed by the mere words found in the written record. The verdict of the jury implies that the theory of the state as shown by the photographs and as explained by witnesses who testified at the trial was accepted by the jury as being legitimately before the jury and susceptible of the conclusion for which the state contends, namely, that the physical facts exclude the probability of accident. We deem the evidence to which we have referred such as justified the jury in concluding that the death of the deceased was not due to accident or suicide but to the act of appellant.

State v. *O'Brien,* 26 Northwestern 752. Opinion of the Court:

It is suggested that the verdict is not supported by the evidence and that it is not shown that the death of Stocum resulted from the injury inflicted by defendant. The evidence shows that deceased had not been in good health for several months. About three weeks before the assault in question, he consulted a physician

who found his heart in a diseased condition and treated him for heart difficulty. He improved steadily under that treatment until the assault was made. If this testimony at the preliminary examination and his dying declaration were correct, he was choked and kicked and otherwise cruelly maltreated by defendant. It is certain he was greatly excited by the encounter. The medical testimony showed that his condition and failing health after the assault and his death were natural and probable results of his condition, * * *. It was the province of the jury to determine whether the wrongful act of the defendant caused or contributed to the death. The fact that he was afflicted with a disease which might have proved fatal did not justify the wrongful acts of defendant or constitute a defense in law, nor did ignorance of the defendant toward the condition of the deceased Stocum excuse his acts. We think the evidence sufficient to sustain the verdict and find no error prejudicial to defendant to which he can complain.

Payne v. *Commonwealth,* 159 Southwestern (2) 430. Opinion of the Court:

The chief argument is that the Commonwealth, having the burden, failed to prove that Helton's death resulted from the blow delivered by appellant. This contention, according to appellant's counsel, is fortified by the testimony of Dr. Clifton. The examination of the doctor was less than perfunctory. He merely said that he discovered no marks or wounds on the body. This evidence is neither prosecutive or conclusive on the jury. Here the uncontradicted

proof is that Payne delivered a blow which he says knocked Helton down. He fell backward, his head striking the surface of the black top road. Payne and his friends walked away under the belief that Helton was merely knocked out. There is no showing that Helton regained consciousness after falling. He was carried to a nearby gas station and shortly thereafter died. There were no intervening causes. It is true that corpus delecti consists of two essential elements. First the death of the person and second the existence of some criminal agency causing death. The latter must be established by satisfactory evidence and this evidence may be circumstantial. There must be established such circumstances as from which the Jury may draw a reasonable inference that a crime has been committed. In fact, the circumstances in the instant case sufficiently show that the moving cause of Helton's death was the blow delivered by the hand or fist of the accused. On the whole case, we conclude that there was no error on the trial which deprives appellant of any of his rights.

People v. *O'Connell,* 29 New York Supplement 195. Opinion of the Court:

This evidence was uncontradicted except as to the possibility suggested by the counsel for the defendant on cross-examination of the miscarriage being brought on by some cause other than shown by the evidence. It is clear that a cause sufficient to bring a result being proven and no other cause being shown to have existed is a sufficient basis for the conclusion that the result arose from the known cause rather than from some cause the existence of which there is

> not the slightest evidence to establish. If, when a sufficient cause to bring a result is proven, it is necessary to negative every other contingency which might produce the same result, convictions for crimes of violence would certainly be a rarity. It was not only evidence which justified the jury in finding that this assault was the reason for the miscarriage but the evidence absolutely compelled such a conclusion and no man could arrive at any different result who is guided by any experience.

Parovich v. *United States,* 205 U. S. 86. The case originated in the Third Judicial Division, Territory of Alaska.

> While in this case there was no witness to the homicide and the identification of the body found was not perfect owing to its condition by its having been partially burned, yet as the circumstantial evidence was clear enough to warrant the jury in finding that the body was that of a person alleged to have been murdered and that he had been killed by defendant, the trial court would not have been justified in withdrawing the case from the jury but properly overruled a motion to instruct a verdict of not guilty for lack of proof of corpus delicti.

Other cases which support the principle that cause of death can be established by circumstantial evidence are:

Rutledge v. *State,* 15 Pac. 2d 255.
Scott v. *State,* 47 Southwestern 531.
Patton v. *State,* 80 Southwestern 86.
Dial v. *Commonwealth,* 109 Southwestern (2) 41.

Morris v. *State,* 191 Northwestern 717.
Baker v. *State,* 11 Southern Reporter 492.

Appellant has cited a number of cases in support of his contention that the corpus delicti must be established. However, with few exceptions, the cases cited merely state that fact as a principle of law, and several of the cases cited by appellant which go further than a bare statement of the law, can be distinguished from the present case on several different grounds. In *State* v. *Fisher,* 288 Pac. 215, Appellant's Opening Brief, page 13, a case in which the defendant had contended that the corpus delicti had not been proved, the Court stated:

> That corpus delicti must be proved beyond a reasonable doubt before a person can be convicted of a crime is elementary, but that the corpus delicti can be proved by circumstantial evidence is equally well-established in this State by authorities above cited. (*State* v. *Weston,* 201 Pac. 1085. *State* v. *Brinkley,* 104 Pac. 893, 105 Pac. 708).

Coleman v. *Commonwealth,* 138 Southwest 2d 333, App. Op. Br. p. 14. There was sufficient evidence to support the contention that the deceased had been run over by a car rather than beaten to death. *Harris* v. *State,* 124 Southern 493, App. Op. Br. p. 14. The fact of the death of the victim was never established and a new trial was ordered on those grounds. In *State* v. *Roush,* 120 Southeastern 304, App. Op. Br. p. 15, it was contended that the cause of death was not proven. However, at page 308, the Court stated:

> We are not unmindful of the rule that a verdict cannot be disturbed where evidence is suffi-

> ciently conflicting to warrant a difference of opinion; that the jury may make reasonable inferences from facts well-established; and that the weight of evidence and credibility of witnesses is peculiarly within their keeping and finding.

Appellant has further cited *State* v. *Cobo,* 60 Pac. 2d 952, App. Op. Br. p. 13, which case he uses to support a mere definition as to what constitutes the corpus delicti. However, an examination of that case will indicate that the Court went much further. At page 954 we find the following language:

> The evidence is sufficient to show that whatever violence was inflicted on the body of the deceased was inflicted from blows struck by defendant in the encounter or fight, the Fact of death being shown and evidence to show that the cause thereof was from blows struck by defendant sufficiently established the corpus delicti, the body of the alleged crime. * * * But the testimony of the physicians who made the autopsy is to the effect that the subdural hemorrhage, the immediate cause of death, could be and probably was produced from the infliction of violence as shown by the character of the bruises and contusion on the chin, on the back of the head, and on the face of the deceased. That is, the force and extent of violence inflicted to produce such character of bruises and contusions could and probably did produce the subdural homorrhage. We think the corpus delicti was sufficiently established.

Page 955.

> That a blow struck by the fist to the chin or jaw might, under certain circumstances, cause death, cannot be disputed.

People v. *Ives,* 110 Pac. 2d 408, App. Op. Br. p. 14. It is deemed advisable to set forth at greater length the Court's opinion in that case.

> (3–5). The corpus delicti may be proven by circumstantial evidence, and the reasonable inferences drawn therefrom. To warrant a conviction it must be proven to a moral certainty and beyond a reasonable doubt, but it is not necessary that it should be so proven before other evidence is introduced which corroborates it or strengthens reasonable inferences drawn therefrom. If a prima facie case is presented that the deceased met his death by means of an unlawful act of another, the evidence is sufficient. *People* v. *King,* 213 Cal. 89, 1 P. 2d 15; *People* v. *Selby,* 198 Cal. 426, 245 P. 426; *People* v. *Vertrees,* 169 Cal. 404, 146 P. 890; *People* v. *Wilkins,* 158 Cal. 530, 111 P. 612; *People* v. *Bonilla,* 114 Cal. App. 219, 299 P. 784; *People* v. *Wagner,* 21 Cal. App. 2d 92, 68 P. 2d 277.

From the foregoing citations by both appellee and appellant, it is submitted that the appellee has sufficiently proven the corpus delicti under the tests prescribed therein.

We now turn to the second contention of appellant that the plaintiff, or appellee herein, has failed to introduce sufficient evidence to justify the verdict of

the jury finding the defendant guilty of the crime charged.

In addition to the facts above set forth with reference to the corpus delicti, the record reveals the following:

The witness Harvey Bell testified that he heard fighting in the appellant's house and a lot of screaming and hollering; that upon entering, he found the appellant's wife lying down under the table and that the appellant was on top of her and fighting her and apparently choking her because he had hold of her neck, that the witness Bell separated the two and that in the struggle the stove was pulled away from the wall (R. 15) and that after talking to appellant and his wife, appellant promised he would behave (R. 16). This altercation took place at approximately 9:30 in the evening of September 28 (R. 19). Mrs. Lois Bell, who appeared on the scene shortly after appellant and his wife had been separated by her husband, testified that she gathered from the conversation between her husband and the appellant that there had been some difficulty between the appellant and his wife and that the appellant had promised to behave himself (R. 27). Later in the evening, at approximately 10:30, Fannie Pletnikoff Burton testified that she got home from church and that she heard someone crying in the home of appellant from about 11:00 o'clock to approximately 2:30 o'clock in the morning (R. 33, 152). She further testified that it was either a baby or a woman's voice, but it sounded more like a woman; that the baby was a tiny baby about ten months old. All of this crying came from the home

of the appellant. This witness also testified that at approximately 2:00 o'clock in the morning she heard a noise like chairs falling around or something like that (R. 152).

It will be remembered that Eva Cheresin, the deceased's mother, testified that Nellie left her place about 10:00 the evening in question and that the appellant left about a half hour later with his baby (R. 47). This testimony places the appellant in his home with his wife and baby at approximately the time that a witness, Fannie Pletnikoff Burton, first heard the crying. The appellant, himself, stated to Mrs. Cheresin that upon his arrival home after leaving her place, he had slept with his child in the same house all night (R. 48–49).

According to Frederick Frohbose, an agent of the Federal Bureau of Investigation, the appellant admitted to him that he had the first fight with his wife, that is, the fight that was interrupted by Mr. Bell, and that later in the evening he returned from his mother-in-law's house, where his wife had been, and upon going home engaged in another fight with his wife and that, while he was rather vague as to the fight itself, he did state that his wife ended up by the bed and he thought she was asleep so he put a blanket over her, that he then went to bed himself and went to sleep with the child (R. 87–88). He stated that he did not mean to kill his wife, that he had been drinking heavily and everything was vague in his mind and that he didn't know what he was doing (R. 89).

L. Verne Robinson, a Deputy United States Marshal who assisted Mr. Frohbose in investigating the case, also had a conversation with the appellant, Leonty Savoroff, and testified to substantially the same facts as those given by Mr. Frohbose—that the appellant had stated that he had had a fight with his wife which had been interrupted by Mr. Bell. Appellant further made the statement in Robinson's presence that he did not mean to kill his wife and that he had been drinking (R. 93–94).

While there is some question about the competency of the evidence, it was brought out by a question to Mr. Robinson by appellant's counsel that someone had stated to him, perhaps the deceased's mother, that appellant had beaten her up numerous times, that there had been numerous fights between the appellant and his wife, and that she was badly bruised on various occasions (R. 95). It will further be noted that Mr. Frohbose corroborated the testimony of Mr. Bell to the extent that the stove had been pulled away from the wall, that the stove was sitting askew at the time he made his investigation (R. 57).

It is submitted that from the foregoing facts there is ample evidence from which the jury could legally infer that a crime had been committed and that appellant was guilty of committing such crime, and it is evident from the verdict of the jury that they made such inferences from the facts proven. It is true that there were no eye witnesses to the second encounter between the appellant and his wife, but there is certainly sufficiently strong circumstantial

evidence which, when taken together with admissions made by the defendant himself, justified the jury in entertaining an opinion that the appellant was guilty beyond any reasonable doubt. That the jury has the right to draw inferences from a proven set of facts is well settled.

In *Wilson* v. *United States,* 162 U. S. 613 at page 640 the Court declares:

> Again, the existence of blood stains at or near a place where violence has been inflicted is always relevant and admissible in evidence. *Wharton Criminal Evidence,* Section 778; *Commonwealth* v. *Sturtivant,* 117 Mass. 122. The trial judge left it to the jury if they found that there were blood stains and that the defendant has not satisfactorily explained them, to draw the inference in the exercise of their judgment that it was an act of deadly violence perpetrated against a person while upon or connected with the bed clothing; in other words, that the jury might regard blood stains not satisfactorily explained as a circumstance in determining whether or not a murder had been committed.

It is contended by appellant that there is no testimony that appellant struck his wife on the night of September 28, 1946. However, the evidence does not support such contention. Unless the testimony of Harvey Bell and his wife are to be disregarded entirely, we have an eye witness to the first encounter on the evening of September 28, 1946, at which time the appellant was physically interrupted in his acts of violence toward the deceased (R. 24).

In addition to that testimony we have the further evidence, as testified to by many of the witnesses, as to the condition of the deceased's body. The nature of the bruises themselves would indicate that blows had been administered on the body and face of the deceased. These facts, when taken together with the appellant's admissions as testified to by witnesses Frohbose and Robinson, are sufficient to establish the fact that appellant did strike his wife.

In *People* v. *Ives,* 110 Pac. 2d 408, which has previously been cited in this brief and which was also cited by appellant, we find under Headnote 10, in the Court's opinion, the following language:

> (10) The corpus delicti having been proven sufficiently, irrespective of the testimony of the defendants, certain statements made by each were admissible in evidence over objection by them. A search of the record does not disclose any ground upon which an objection could have been properly sustained. If any possible error appeared in the reception in evidence of the statements, such error was rendered harmless by each defendant voluntarily appearing on the witness stand and testifying relative to the same matters. *People* v. *McLachlan,* 13 Cal. 2d 45, 87 P. 2d 825.

It will be further noted that not only was such evidence as to the statements of appellant admissible, but no objections were interposed by appellant as to the admission of such evidence. It is true that there is no direct testimony as to what prompted appellant to attack his wife. However, it is submitted that there

is evidence from which it can be logically inferred that the trouble was caused by the fact that appellant did not want his wife going out and drinking. During the period of time that they were in Ketchikan, appellant and his wife had had differences in this respect.

The witness, Willie Ermeloff, testified for the defense (R. 115):

> Q. And while you were there did you have occasion to observe the conduct of the defendant's wife, Nellie Savoroff? A. Yes, She * * * at times she used to go downtown and get to drinking and then she failed to come home and at times stayed away from home as long as a week or more.
>
> Q. Then what would happen after that? A. Well, finally Leonty would locate her and he would bring her home. Sometimes she would be drunk. Sometimes she would be sober when he brought her home.

As to the fatal night in question, we find the appellant himself testifying from the stand as follows:

> And I landed by the beach there and I went straight home to take my boots off and I went in there and my wife was ready to—with a white cloth to baptize baby girl and I see her—she was drinking already so I told her not to look for drink. She said "Yes" (R. 132).

On cross-examination appellant testified as follows:

> Q. Is your wife in the habit of sleeping on the floor at night? A. No, she never does.

> Q. Well, then, don't you think it was rather unusual that she was sleeping on the floor that night? A. I just don't want to wake her up because a lot of boys had drinks. She never stays home * * *.

The Supreme Court has touched upon this type of evidence in *Thiede* v. *Utah Territory,* 159 U. S. 510, pages 517, 518:

> Now the most of the testimony objected to was introduced for the purpose of showing ill treatment by defendant of deceased, and a state of bitter feeling between them. This, of course, bears on the questions of motive, and tends to rebut the presumed improbability of a husband murdering his wife. The witnesses testified to hearing the deceased scream at several times; to seeing her with black eyes and a bruised face; to her eyes looking red; to her crying on several occasions, and appearing alarmed and scared, and to bruises and discolorations of her body. The objection was that these witnesses did not connect the defendant with these appearances, or testify that he was the cause of them. It is true these matters do not constitute direct evidence of ill treatment or a long-continued quarrel, but they are circumstances which, taken in connection with the testimony of what was seen and heard passing between the defendant and his wife, were fairly to be considered by the jury in determining the truth in respect thereto. Whether the relations between the defendant and his wife were friendly or the reverse was to be settled, not by direct or positive, but by circumstantial evidence, and any circumstance which tended

> to throw light thereon might fairly be admitted in evidence before the jury. *Alexander* v. *United States,* 138 U. S. 353; *Holmes* v. *Goldsmith,* 147 U. S. 150; *Moore* v. *United States,* 150 U. S. 57. In the second of these cases, page 164, this court observed: "As has been frequently said, great latitude is allowed in the reception of circumstantial evidence, the aid of which is constantly required, and, therefore, where direct evidence of the fact is wanting, the more the jury can see of the surrounding facts and circumstances the more correct their judgment is likely to be."

All of this evidence was entitled to go to the jury for their consideration under proper instructions from the Court. *Hickman* v. *Jones,* 76 U. S. 197, p. 201:

> It is as much within the province of the jury to decide questions of fact as of the Court to decide questions of law. The jury should take the law as laid down by the Court and give it full effect by its application to the facts, and the facts themselves—it is for them to determine. These are the checks and balances which give to the trial by jury its value. Experience has proved their importance. They are indispensable to the harmony and proper efficacy of the system. Such is the law.

That the rights of the appellant were fully protected under proper instructions by the Court is revealed by an examination of such instructions. Particular attention is directed to Instructions No. 5 (R. 161), No. 5–A (R. 163) and No. 7 (R. 164).

II and III

The Court did not err in denying the motion of the defendant made at the close of the Government's case for judgment of acquittal. The Court did not err in denying the motion of the defendant for a judgment of acquittal at the conclusion of the trial

The arguments on these two assignments of error are presented together by appellant (App. Op. Br. p. 20) and they will be so treated here.

While it is believed that all three assignments of error by appellant could be treated under the same argument, inasmuch as appellant has seen fit to present further argument under the present assignments, it will be briefly treated in that manner here. It is requested that the facts and citations previously set forth in this brief under assignment of error No. I be also considered and incorporated under the present assignments of error.

The appellant dwells at some length upon the testimony to the effect that the appellant stated "he didn't mean to kill his wife," and he submits a number of citations that such statements are not sufficient to prove the corpus delicti unless there is other evidence of proof thereof. This contention can be briefly disposed of by referring to the facts and citations previously presented by appellee in this brief to the effect that there is ample evidence corroborating the declarations of appellant. The most that can be said of appellant's contention in this respect is that it was argument to be considered by the jury, who were the triers of the facts. It was within their province to determine what construction should be

placed upon appellant's declaration. It was for them to consider what appellant meant by such statement. That there could be an honest difference of opinion as to what the appellant meant is borne out by appellant's own argument when he gives the following question and answer by the government witness, Mr. Robinson:

> Q. Do you mean—think he meant he didn't mean to kill his wife in the way you or I would say it, or do you think it was that he was using an idiom of speech—in his unfamiliarity—"if I killed her I didn't mean to"?
>
> A. If I would attempt to attach a meaning to his words I would assume he meant he was fighting with her and she was dead and he didn't mean to kill her. (App. Op. Br. p. 23.)

It is submitted that the witness Robinson, a Deputy United States Marshal, can be considered as a man with a reasonable mind, and if he placed that particular interpretation upon the appellant's statement, it cannot be logically argued that twelve other people who are presumed to have reasonable minds could not be permitted to indulge in the same construction.

Appellant has apparently seen fit, deliberately or otherwise, to ignore entirely the further statement by the appellant to the witness Frohbose that the appellant admitted having had the first fight with his wife, that he had had a lot to drink, and that after engaging in the second fight his wife ended up by the bed; that he thought she was asleep and put a blanket over her; that he stated he did not mean to kill his wife (R. 87–89).

The propriety of appellant's argument contended in his opening brief at page 22 as to the testimony relative to a statement signed by the appellant is seriously questioned. All of such testimony was given in the absence of the jury (R. 61) in order to determine the admissibility of such statement. Upon the completion of the examination as to the admissibility of the statement, the Court denied its admission (R. 86). From an examination of the record (R. 61–86), there is a grave question as to whether or not the Court erred in refusing to admit the statement into evidence. However, inasmuch as it was not admitted, it cannot be properly used as a basis for argument by appellant, and whatever value it might have, if any, is a question with which we are in no wise here concerned.

The appellant's case consisted in substance of his denial, while upon the witness stand, of all of the pertinent facts to which the government witnesses testified. The balance of his defense consisted of an extremely weak attempt to fasten the blame for the death of deceased upon one Emil Cheresin, and other testimony going to the credibility of the government witness, Harvey Bell. So, in effect, we have on one hand the contention by the appellant that he had nothing whatever to do with his wife's death, and on the other hand, testimony by the government witnesses from which it could be inferred that the appellant was criminally responsible for the death of his wife. Under such conditions it was a matter for the jury to determine the guilt or innocence of the appellant.

Murray v. *United States,* 288 Federal 1008. Under Headnote 16 of the Court's opinion we find the following:

> At the close of the evidence the defendant again moved for a directed verdict and argues here that it should have been granted because the evidence was not of such a character that reasonable men could see beyond a reasonable doubt that defendant was guilty. The defense was that decedent's death was accidentally caused by the defendant in repelling a threatened assault upon him by her. His evidence tended to show that a quarrel arose between them that night because she was not willing to let him go out; that when he persisted in doing so she approached him in a threatening manner as if to strike, whereupon he struck her near the eye but not with any weapon; that she immediately fell and struck upon something which gave her the mortal wound; that the rocker was the only thing he saw that could have caused it; that he did not intend to kill her or inflict serious bodily harm; that she was addicted to the use of intoxicating liquors; that he did not have a stick in his hand the night of her death; that he never threatened to kill her or to throw her out of the house; that they had fights; that his weight was about 103 and hers about 115 pounds.
>
> We are unable to agree with counsel for defendant that on the whole evidence the Court was required or would have been justified to grant the motion of the defendant. As was

said in *Burton* v. *United States,* 202 U. S. 344, where a like motion was under consideration:

> "There was beyond question evidence tending to establish on one side the defendant's guilt of the charges preferred against him, on the other side his innocence of those charges. The trial court was not authorized to take the case from the jury and direct a verdict of not guilty. That could not have been pursued consistently with the principles that underlie the system of trial by jury."

That the jury did not attach a great deal of weight to the testimony attempting to involve Emil Cheresin as the guilty party is obvious from their verdict, which is justified by the record itself. Appellant, himself, testified that Emil Cheresin was at his mother-in-law's on the evening in question and that there was some struggle between himself and others over a small suitcase. It can further be gathered from his testimony that Emil Cheresin was present at the home of Eva Cheresin, the mother-in-law, during the period of time between the departure of the deceased, Nellie Savoroff, and the appellant (R. 135).

A further significant fact in this connection is the testimony of the deceased's mother, Eva Cheresin, to the following effect concerning the swollen hand of Emil Cheresin:

> Q. Did you notice his right fist? A. He showed me his right hand and said it was swollen and I looked at it. It was swollen but he did not tell me how he done it (R. 51).

It seems contrary to all legitimate reasoning that had Emil Cheresin been implicated in the death of

her daughter, he would have voluntarily shown his swollen hand to the deceased's mother. The appellant could no doubt have produced evidence indicating that any number of men in the village of Nikolski, following the evening of celebration on September 28, 1946, had swollen hands or other evidence of having been involved in fights. We submit, however, that any such defense is testing the credulity of the jury to the breaking point.

The jury was the sole judge as to the credibility of the witnesses, both for the government and the defense. That they preferred to believe the testimony of Harvey Bell rather than that of the appellant and other witnesses for the defense is not difficult to understand from the facts of the case, particularly when it is seriously contended by appellant that Bell's testimony should be discredited because, among other things, he had indulged in two drinks and that the appellant's testimony should be given more weight although, by his own admission, he had had at least eight drinks (R. 131).

Certain parts of appellant's testimony were also discredited by John Fletcher, the United States Commissioner, who held the coroner's inquest into the death of Nellie Savoroff at which inquest the appellant took the stand as a witness.

> Q. Question: You do remember Mr. Bell asking you not to fight with Nellie and then you promised to behave after that, didn't you? Answer yes. A. That's right.
>
> Q. Question: Do you remember Feddie coming in? A. Yes, Feddie asked for a drink. I

didn't have any so Feddie gives me drink. We both drink, then we drink some more.

Q. You recall that question and answer? A. I believe I do.

The credibility of the witnesses Willie Ermeloff and Christine Dushkin were also discredited to some extent. Willie Ermeloff testified that although he had brought five quarts of whiskey with him to Nikolski (R. 124), he didn't drink himself because of his physical condition and that he had only had one little drink last winter. However, the witness Bell testified that he admitted having been drinking on the evening in question (R. 150). Bell further testified to the fact that he had seen a bulletin posted in the village of Nikolski, signed by Willie Ermeloff, to the effect that Willie had promised he would not drink any more and that he would not beat his wife any more and that he would not make any raisin jack any more or any alcoholic beverages of any shape or form (R. 151).

It was also proper for the jury to take into account the interest that any of the witnesses might have in the case. There can be no question as to the appellant's interest in the outcome of the case, and the fact that Willie Ermeloff was a brother-in-law of the appellant and that Christine Dushkin was appellant's sister were facts for the jury to consider with reference to the credibility of the witnesses.

In reviewing all of the evidence presented, the verdict of the jury must be sustained if there is substantial evidence taking the view most favorable to the government to support it. *Glasser* v. *United States,* 315 U. S. 60. *Borgia* v. *United States* (C. C. A. 9),

78 Federal 2d 550, 555. *Henderson* v. *United States* (C. C. A. 9), 143 Federal 2d 681, 682. *Suetter* v. *United States* (C. C. A. 9) 140 Federal 2d 103, 107. *Hemphill* v. *United States* (C. C. A. 9) 120 Federal 2d 115, 117.

Viewed in the light of the rule above stated, the case was properly submitted to the jury. In considering the question of request for a directed verdict, the Court in the case of *United States* v. *Morley,* 99 Federal 2d 683 stated:

Page 685.

> (5) On the other hand, let it be said, defendant has not necessarily established a case for a directed verdict in his favor by professing innocence and denying the existence of criminal intent. If the established facts and inescapable inferences are inconsistent with the accused's professions of innocence, it becomes the problem of the jury to weigh the evidence and determine, under proper instructions dealing with quantum of proof necessary to convict, the guilt or innocence of the accused.
>
> (6) The existence of guilty knowledge and the presence of a criminal intent are not matters provable with the certainty that facts may be established by documentary proof. No X-ray picture will reproduce and reflect the state of the accused's mind. Only by weighing the acts of the accused against his professions of innocence when they are inconsistent, can the fact-finding body reach an intelligent verdict or finding. If the accused's acts and assurances are reconcilable, then no jury question is presented and the defendant should be dismissed. If,

> however, there be irreconcilability—if the acts of the accused dispute his assurances of innocence and the conflict is vital, then the court must let the jury weigh the conflicting evidence and decide.

The following case is also cited in this connection, and it is set forth at some length because it goes into the question here involved rather thoroughly and is a well reasoned opinion. *Curley* v. *United States* (1947) 160 Federal 2d 229.

Page 232.

> It is true that the quoted statement seems to say that unless the evidence excludes the hypothesis of innocence, the judge must direct a verdict. And it also seems to say that if the evidence is such that a reasonable mind might fairly conclude either innocence or guilt, a verdict of guilt must be reversed on appeal. But obviously neither of those translations is the law. Logically, the ultimate premise of that thesis is that if a reasonable mind might have a reasonable doubt, there is, therefore, a reasonable doubt. That is not true. Like many another rule become trite by repetition, the quoted statement is misleading and has become confused in application.
>
> (2–6) The functions of the jury include the determination of the credibility of witnesses, the weighing of the evidence, and the drawing of justifiable inferences of fact from proven facts. It is the function of the judge to deny the jury any opportunity to operate beyond its province. The jury may not be permitted to conjecture merely, or to conclude upon pure speculation or from passion, prejudice or sym-

pathy. The critical point in this boundary is the existence or non-existence of a reasonable doubt as to guilt. If the evidence is such that reasonable jurymen must necessarily have such a doubt, the judge must require acquittal, because no other result is permissible within the fixed bounds of jury consideration. But if a reasonable mind might fairly have a reasonable doubt or might fairly not have one, the case is for the jury, and the decision is for the jurors to make. The law recognizes that the scope of a reasonable mind is broad. Its conclusion is not always a point certain, but, upon given evidence, may be one of a number of conclusions. Both innocence and guilt beyond reasonable doubt may lie fairly within the limits of reasonable conclusion from given facts. The judge's function is exhausted when he determines that the evidence does or does not permit the conclusion of guilt beyond reasonable doubt within the fair operation of a reasonable mind.

Pages 232, 233.

(7–9) The true rule, therefore, is that a trial judge, in passing upon a motion for directed verdict of acquittal, must determine whether upon the evidence, giving full play to the right of the jury to determine credibility, weigh the evidence, and draw justifiable inferences of fact, a reasonable mind might fairly conclude guilt beyond a reasonable doubt. If he concludes that upon the evidence there must be such a doubt in a reasonable mind, he must grant the motion; or, to state it another way, if there is no evidence upon which a reasonable mind might fairly conclude guilt beyond reasonable doubt, the motion must be granted. If he con-

cludes that either of the two results, a reasonable doubt or no reasonable doubt, is fairly possible, he must let the jury decide the matter. In a given case, particularly one of circumstantial evidence, that determination may depend upon the difference between pure speculation and legitimate inference from proven facts. The task of the judge in such case is not easy, for the rule of reason is frequently difficult to apply, but we know of no way to avoid that difficulty.

Page 237.

(12, 13) The decision in the case rests squarely upon the rule of law governing the action of the trial judge upon the motion for directed verdict of acquittal and the action of an appellate court upon a verdict of conviction. We agree, as Curley contends, that upon the evidence reasonable minds might have had a reasonable doubt. As much might be said in many, if not in most, criminal cases. The jury, within the realm of reason, might have concluded that it was possible that Curley was merely a figurehead, that he had complete faith in Fuller, that he never asked any questions, that he was never informed as to the contents of the contracts with customers or the financial statements or the use of the money; in short, that it was possible that he was as much put upon as were the customers. If the jury had concluded that such was a reasonable possibility, it might have had a reasonable doubt as to guilt. But, as we have stated, that possibility is not the criterion which determines the action of the trial judge upon the motion for directed verdict

and is not the basis upon which this court must test the validity of the verdict and the judgment. If the evidence reasonably permits a verdict of acquittal or a verdict of guilt, the decision is for the jury to make. In such case, an appellate court cannot disturb the judgment of the jury. If we ourselves doubted Curley's guilt, that doubt would be legally immaterial, in view of the evidence and the rule of law applicable.

CONCLUSION

Appellant had a fair and impartial trial and there was sufficient evidence to support the verdict of the jury. The Court, in its instructions and rulings on motions made by the defense, acted fairly and with justice. No reason whatever exists for upsetting the verdict of the jury, which heard all of the evidence presented by both the government and the appellant, and which had an opportunity to observe the demeanor and determine the credibility of all the witnesses, and found appellant guilty as charged. It is respectfully submitted that the judgment of conviction should be affirmed.

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U. S. GOVERNMENT PRINTING OFFICE: 1948

No. 11814

In the United States Circuit Court of Appeals
for the Ninth Circuit

T. J. BRANDON, JR., with alias THOMAS JEFFERSON, WILL KEY JEFFERSON, Appellant

vs.

UNITED STATES OF AMERICA, Appellee

ON APPEAL FROM THE DISTRICT COURT FOR THE TERRITORY OF ALASKA, THIRD DIVISION

BRIEF FOR THE APPELLEE

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United States Attorney,
Anchorage, Alaska
Attorney for Appellee.

SUBJECT INDEX

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BRIEF FOR THE APPELLEE

JURISDICTIONAL STATEMENT

The statement of jurisdiction is properly set forth in Appellant's opening Brief (p. 1).

STATEMENT OF FACTS

The indictment in this case was returned against the defendant-appellant as Will Key Jefferson. However, at the trial he stated that his true name was T. J. Brandon, Jr.; that he had also used the name Thomas Jefferson; and that he was known in Anchorage as Will Key Jefferson (R. 240-241, 273-274). In this brief the appellant will be referred to as Will Key Jefferson.

During February of 1945, Fred Lange, a former resident of Paducah, Kentucky, lived at the Deeleventh Apartments in Anchorage (R 58, 254, 256, 258). These apartments were at that time owned by Will Key Jefferson, and were still in the process of construction. As stated in Appellant's Brief, at page 2, Jefferson was short of money. He was delinquent with his accounts at the Northern Commercial Company (R. 78, 79), and the record reflects that shortly thereafter his financial condition was such that he was unable to pay a hospital bill of between thirty and forty dollars (R. 312).

During the first part of February, 1945, Jefferson had inquired of Fred Lange the names of banks in Paducah, Kentucky (R 58). Fred Lange advised Jefferson that there were two banks located there, the Peoples National Bank of Paducah and the Citizens Savings Bank of Paducah (R. 58). Jefferson confirmed the fact that the Peoples National Bank of Paducah, Kentucky, existed, through Mr. George Mumford of the Bank of Alaska at Anchorage, Alaska (R. 253, 254).

On approximately February 10, 1945, Jefferson cashed a check (Plaintiff's Exhibit No. 1) drawn on the Peoples National Bank of Paducah, Kentucky, payable to the Deeleventh Apartments of Anchorage, Alaska, in the amount of $496.80, signed by Wosdon P. Lang, at the Northern Commercial Company in Anchorage (R. 60). When this check was cashed by Henry Cole, Credit Manager of the Northern Commercial Company, the sum of $50.00 was applied to one of Jefferson's accounts; $85.00 to another account; and he re-

ceived the balance of $361.80 in cash (R. 61). The signature "Wosdon P. Lang" on this check was forged by the appellant in this action, Will Key Jefferson (R. 135, 163, 164, 193).

On or about March 7th or 8th, 1945, Jefferson claimed to have received a letter from Nancy Lang (Defendant's Exhibit "I") which in substance advised him that the check would be dishonored (R. 248, 249).

On March 6, 1945, the check was mailed to the Anchorage office of the Northern Commercial Company by the Seattle office (R. 386). As soon as this check was returned to Anchorage with the notation "Protested for non-payment this February 27, 1945, Marie E. Roth, Notary Public", Jefferson was so notified (R. 65). He at that time made no effort to make good the check (R. 66, 71). For this reason the check was subsequently referred to W. N. Cuddy, attorney for the Northern Commercial Company, for the purpose of collection (R. 375). After efforts to collect the check from Jefferson had failed and it was discovered that certain irregularities existed, the check was referred to the United States Attorney for investigation (R. 375). The check was personally delivered to the Assistant United States Attorney by Mr. Cuddy and Mr. Cole on May 16, 1945 (R. 74, 75, 78, 354). It was not until the check had been turned over to the office of the United States Attorney and an investigation had been commenced that Jefferson made an effort to get back the check (R. 74, 75, 381). The check remained in the custody of the United States Attorney from May 16, 1945, to June 20,

1945, when it was returned to Mr. Cole by the Assistant United States Attorney who at that time understood that the check was to be paid (R. 354).

During the period from May 16 to June 20, 1945, when the check was in the possession of the United States Attorney's office, Jefferson made several frantic efforts to get the check back into his possession (R. 311, 312, 319, 341-343, 209). On several occasions he declined to make the check good unless the check itself was redelivered to him.

On June 12, 1945, Jefferson borrowed sufficient money to pay off the check and to pay another bill which he owed, from a finance company operated by Andrew Hassman (R. 280, 311, 312). During May or June of 1945, Jefferson sought the assistance of Attorney Harold Butcher in securing the return of the check (R. 319). He also sought the assistance of Attorney Stanley J. McCutcheon in recovering the check (R. 341-343). Although at the time of the trial McCutcheon had no recollection as to the date he endeavored to secure the return of the check he admitted that it could have been between May 16 and June 20, 1945 (R. 343).

It is apparent from the record that Jefferson's financial condition was such that the only time he had sufficient funds in his possession to make good the check was subsequent to June 12, 1945, the date that he had obtained a loan from the finance company (R. 280, 311, 312). Incidentally, all his efforts to get the check

back into his possession were made at or about that date (R. 280-285) and were made during the time the check was in the custody of the United States Attorney (R. 311, 312, 354).

The check in question was typed on an Underwood Standard Typewriter, Serial No. 4236469, which was rented by Jefferson from the Townsend Typewriter Shop from December 14, 1944, to September 28, 1946 (R. 127-128, 139-140, 244-245).

During February of 1945, Jefferson was employed to put in some shelving at the Townsend Typewriter Shop (R. 92). He had a key to the premises which he retained until February 16, 1945 (R. 282-284). On the top of a filing cabinet located in the Townsend Typewriter Shop during February, 1945, there was an F & E check protector, serial No. 2758148 (R. 90-91). The check protector impression on plaintiff's exhibit No. 1, the check cashed at the Northern Commercial Company on February 10, 1945, by Jefferson, was made on this check protector (R. 138-139). Although the check was returned to Mr. Cole of the Northern Commercial Company on June 20, 1945, by the Assistant United States Attorney with the understanding that the same was to be paid (R. 354), this was not done, and on October 9, 1945, the check was turned over to the Federal Bureau of Investigation (R. 206). The check had not been paid on December 31, 1945, when Mr. Cole left the employment of the Northern Commercial Company (R. 66, 67), and from the record it is apparent that the Northern Commercial Company had not been reimbursed at the time of the trial.

ARGUMENT

FIRST POINT RAISED: 1. THE TRIAL COURT DID NOT ERR IN REFUSING TO SET ASIDE THE INDICTMENT AS NOT SUFFICIENT UNDER THE STATUTE.

The pertinent provision of section 4856 Compiled Laws of Alaska 1933, under which this indictment was drawn, reads as follows:

> If any person shall, with intent to injure or defraud anyone, falsely make * * * forge, counterfeit * * *, or check * * *; or shall with such intent, knowingly utter and publish as true and genuine any such false * * * forged, counterfeited * * * instrument * * *, such person upon conviction thereof shall be punished by imprisonment in the penitentiary not less than two nor more than twenty years.

Section 4861 Compiled Laws of Alaska 1933 reads as follows:

> In any case where the intent to injure or defraud is necessary, by the provisions of this chapter, to constitute the crime, it shall be sufficient to allege in the indictment therefor an intent to injure or defraud without naming therein the particular person or body corporate intended to be injured or defrauded, and on the trial of the action it shall not be deemed a variance, but be deemed sufficient, if there appear to be an intent to injure or defraud the United States, or any State, Territory, county, town, or other municipal or

public corporation, or any public officer in his official capacity, or any private corporation, co-partnership, or member thereof, or any particular person or persons.

Ordinarily an indictment based on a statute is sufficient if it follows the wording of the statute or of the statutory form. The present indictment substantially follows the language of Section 4856 Compiled Laws of Alaska 1933, and also substantially follows the wording of the statutory form for forgery indictment set forth under paragraph "O" of Section 5210 Compiled Laws of Alaska 1933, which reads as follows:

> Sec. 5210. Manner of stating act constituting the crime. The manner of stating the act constituting the crime, as set forth hereinafter, is sufficient in all cases where the forms there given are applicable, and in other cases forms may be used as nearly similar as the nature of the case will permit.
> * * *
>
> O.—In an indictment for forgery.
>
> Forged (or falsely made, altered, or counterfeited, or as the case may be) an instrument purporting to be (or being) the last will and testament of C D, devising certain property with intent to defraud or injure.

A brief history of Sections 4856 and 4861 Compiled Laws of Alaska 1933 reflects that the same were adopted as a part of the penal code for the Territory of Alaska by Act of Congress March 3, 1899, 30 Stat-

utes at Large 1263-1266. These provisions were taken from the laws of Oregon, October 19, 1864, and are presently embodied in the Oregon Compiled Laws, Volume 3, Penal Code as Sections 23-560 and 23-568. With this legislative history in mind it would appear that the decisions by the Supreme Court of Oregon should be given controlling effect.

The Supreme Court of Oregon has held that an indictment is sufficient where it alleges an intent to injure or defraud without naming therein the particular person intended to be injured or defrauded.

> **State v. McElvain,** 35 Or. 365; 58 P. 525
> **State v. Frasier,** 95 Or. 90; 180 P. 520
> **Mas v. United States,** USCA DC, 151 F 2d 32
> **Bullington v. State,** 123 Nebr. 432; 243 N.W. 273

Count 1 of the indictment alleges in part, "did then and there knowingly, wilfully * * * **with intent to injure and defraud,** falsely make, forge and counterfeit a check for the payment of money on the Peoples National Bank of Paducah, Kentucky, * * *" (emphasis supplied). This general allegation of intent to defraud is sufficient.

Appellant contends that in the second count of the indictment there is a failure to allege that appellant knew the check was a forgery when he passed it. This contention is without basis.

Count 11 of the Indictment (R. 3-4) charges that the defendant had in his possession a check with a false,

forged and counterfeit signature written on the face thereof and that he "did with intent to injure and defraud, **wilfully,** feloniously, **knowingly** and unlawfully utter and publish as true and genuine to one Henry Cole", etc.

In Instruction 3 the Court correctly defined the words wilfully, feloniously, and unlawfully (R. 8) as follows:

> As used in the indictment in this case, the word "wilfully" means knowingly, intentionally and designedly.
> The word "feloniously" means with criminal intent and evil purpose.
> The word "unlawfully" means wrongfully or contrary to law.

In Instruction 3-A (R. 8) the Court correctly defines the word knowingly as follows:

> "Knowingly" means with knowledge. In cases such as this it implies not only knowledge but bad purpose and evil intent.

When one considers the allegations contained in Count II of the Indictment and the meaning of the words wilfully, feloniously and knowingly, it is apparent that the indictment sufficiently alleges that appellant knew that the check was a forgery when he passed it.

That the Court correctly defined wilfully and knowingly is reflected by the following cases.

In **Wilton v. U. S.** 9 Cir. 156 F 2d, 433, 434, this

Court approved the following instruction on the subject of wilfulness:

> You will note that it is charged in the information that the acts alleged to be done were done knowingly and wilfully. Doing or omitting to do a thing knowingly and wilfully implies not only a knowledge of the thing, but a determination with a bad intent to do it or to omit doing it. When used in a criminal statute it generally means an act done with a bad purpose. The word is also employed to make a thing done without ground for believing it is lawful or conduct marked by careless disregard whether or not one has a right to so act.

See also:

Screws v. U. S., 325 U. S. 101
Spies v. U. S., 317 U. S. 492, 497
U. S. v. Murdock, 290 U. S. 389, 394
Zimberg v. U. S., 1 Cir., 142 F. 2d 132, 137

SECOND POINT RAISED: 2. THE TRIAL COURT DID NOT ERR IN DENYING APPELLANT'S MOTION TO STRIKE THE TESTIMONY OF THE WITNESS APPEL, ON THE GROUNDS THAT IT WAS BASED ON THE EXAMINATION OF DOCUMENTS NOT INTRODUCED IN EVIDENCE.

Section 4014, Compiled Laws of Alaska, 1933, reads as follows:

> In any proceeding before a court or judicial offi-

cer of the Territory of Alaska where the genuineness of the handwriting may be involved, any admitted or proved handwriting of such person shall be competent evidence as a basis for comparison by witness or by the jury, court or officer conducting such proceeding, to prove or disprove such genuineness.

Plaintiff's Exhibit No. 1 (R. 60, 61) is the questioned document in this case. During the trial the court admitted in evidence the following exhibits bearing the proven handwriting of Will Key Jefferson:

(1) Plaintiff's Exhibit No. 6, the same being an accident report dated January 27, 1945, made out and signed by Jefferson (R. 97, 18).

(2) Plaintiff's Exhibit No. 7, the same being an accident report dated October 17, 1945, made out and signed by Jefferson (R. 98).

(3) Plaintiff's Exhibit No. 8, the same being two yellow sheets of handwriting specimens given to the Federal Bureau of Investigation by Jefferson on February 18, 1946 (R. 103).

At page 135 of the Transcript of Record we find the following testimony by the witness Appel:

Q. Then from your examination, study and comparison of Plaintiff's Exhibit No. 1, 6, 7, and 8 do you have an opinion as to whether the writing and signature appearing on Plaintiff's Exhibit No. 1 and the other exhibits which you have were made by one and the same person?

A. Yes, I do.

Q. And in your opinion, Mr. Appel, who made the signatures appearing on all of those documents?

A. I came to the conclusion that the signature "Will Key Jefferson" and the signature "Wosdon P. Lang" on the check, Government's Exhibit 1, were written by the writer of these other exhibits, 6, 7, 8.

Q. And calling your particular attention to the signature, "Wosdon P. Lang", which appears as maker on Plaintiff's Exhibit No. 1, will you state who, in your opinion, affixed that signature to the check? As to Plaintiff's Exhibit 1?

A. Will Key Jefferson, the writer of these ~~just a minute—Plaintiff's Exhibit 6, 7,~~ known exhibits 6, 7 and 8.

And at page 164:

Q. In your examination, Mr. Appel—in your examination, then, you have concluded that the signature "Wosdon P. Lang", appearing on Plaintiff's Exhibit No. 1 was written by the same person who executed the writing on Plaintiff's Exhibit No. 3—just a minute—Plainltiff's Exhibit 6, 7 and 8?

A. Yes.

It is apparent from the record that Appel's conclusion was based upon an examination, study and comparison of the questioned document with Exhibits 6,

7 and 8 which were proved writings of Jefferson and admitted into evidence as standards of comparison.

Appellant contends that inasmuch as it appears that other writings, not introduced in evidence, were used by the witness Appel that the trial court should have stricken his entire testimony. Appellant in support of his contention cites Osborn: "Questions Document Problems", p. 117; Thompson v. Freeman, 111 Fla. 433, 149 So. 740; and In re Iwers Estate, 225 Iowa 389, 280 N. W. 579.

There is no testimony in the record to indicate that the other writings used by Appel, "confirmed and strengthened" his opinion. To the contrary, Appel, specifically testified to the contrary, as follows:

> Q. And those standards that aren't in evidence —do they confirm your opinion that you have from the things that are in evidence?
>
> A. They don't add anything to it. (R. 184).

The facts of the present case are not such that it can be brought within the scope of the proposition stated by Osborn. Nor do the two cases cited by appellant substantiate his contention. The case of Thompson v. Freeman, is more in harmony with appellee's position inasmuch as Appel did have before him the very writings upon which he based his conclusion. These writings were proven writings, admitted in evidence and were available for cross-examination, use by other witnesses or submission to the jury. In addition the writings not introduced in evidence were available in court for what-

ever use or purpose the defendant may have desired.

In the case of **In re Iwer's Estate,** 280 N. W. 579, 586, the court stated:

> We think the trial court was right in ultimately concluding that the objections to the evidence given by Mr. Courtney **based on the memoranda** (not in evidence) should have been sustained. It will be observed that the court struck out not only the inadmissible testimony of the witness but also his opinion that the signature of Iwer's was genuine, although the motion to strike the testimony of the witness as to the signature of Iwer's was based solely on the reasons urged in the prior objections to the use of the memoranda. **The ruling was obviously too favorable to the contestants, but was unchallenged by proponents.** (Emphasis supplied).

It is to be noted in the present case that the witness Appel based his opinion upon proven writings admitted in evidence. Thereafter he gave his reasons for such opinion (R. 153-164). His opinion was not based upon memoranda not in evidence and was illustrated by photographic reproductions of the proven handwriting of Jefferson. These photographic reproductions were also admitted into evidence. (R. 164-167).

In **Steel v. Snyder,** 295 Pa. 120; 144 A. 912, 914, in a case similar to the present case, the court held that the entire testimony of a witness would not be stricken, where the major portion was properly admissible, and only a small portion questioned as inadmissible. In its opinion the court stated:

In addition George W. Wood, a handwriting expert of large experience, studied the signature in question, alone and in connection with others shown to be genuine, and expressed the opinion that the former were forgeries. A motion was made to strike out his evidence for the alleged reason that his opinion was based in part on signatures not in evidence. While his testimony as to that was a little vague, taken as a whole, it was not such as to justify granting the motion. As to this the witness says, inter-alia:

Q. The other signatures you had assisted you in arriving at your opinion? (Those not in evidence).

A. They did not. I would say in a negative way this, in the particulars that they did not contradict the opinion formed from an examination of these signatures themselves.

Q. But in arriving at your opinion, before you had your opinion, you decided you should have other signatures and you did use signatures other than Defendant's Exhibit 1 to help you arrive at your opinion?

A. I would not say to help me because these signatures in question, studied intelligently by any expert, present the earmarks of forgery.

The mere fact that the unidentified signatures did not disprove the conclusion formed from the study of such as were proven certainly did not render the opinion incompetent. Aside from this, the motion was to strike out the entire testimony of the expert, covering 18 printed pages, the major portion of which consisted in a discus-

sion of the disputed signatures by themselves and the intrinsic evidence of forgery they disclose, and other explanations clearly competent, aside from his opinion.

THIRD POINT RAISED: 3. THE TRIAL COURT DID NOT ERR IN DENYING APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL AS TO COUNT 1 OF THE INDICTMENT INASMUCH AS THE INDICTMENT SUFFICIENTLY CHARGED THE CRIME OF FORGERY AND THERE WAS SUFFICIENT PROOF OF INTENT TO DEFRAUD.

Inasmuch as the sufficiency of the indictment has been discussed under the First Point Raised, **supra,** the discussion here will be confined to whether there was sufficient proof of intent to defraud to justify the Court in denying appellant's motion for judgment of acquittal.

Appellant repeatedly asserts there is no proof whatsoever of an intent to defraud anyone. This assertion is not substantiated by the record. While it appears that on a number of occasions appellant did endeavor to recover possession of the check, there is no evidence that he made an effort to reimburse the Northern Commercial Company for the amount that he had obtained from them. It is apparent from the record that appellant's only concern was that of regaining possession of the instrumentality of the crime committed by

him, and his desire to pay the amount of the check was only secondary to the recovery of the check. Appellant realized that, unless he did get the check back into his possession, he would ultimately be charged with the crimes of which he was convicted. Notwithstanding appellant's statement that it would have not been good business for him to have paid the Northern Commercial Company the amount of the check and taken a receipt therefor, it certainly would have negatived any criminal intent. However, the fact that he persistently declined to pay the amount of the check unless the check was redelivered to him, and the fact that he made no effort to pay the check until he learned that a criminal investigation was being made, is strong indication of his intent.

In Vol. 37, C.J.S., Section 100, at page 104, we find the following statement:

> It must be established beyond a reasonable doubt that the accused knew that an instrument was a forgery and that he intended to defraud. Knowledge and intent to defraud may be sufficiently established by circumstantial evidence. The intent to defraud is to be inferred from the deliberate commission of forgery. Thus knowingly passing a forged instrument as genuine is conclusive of an intent to defraud. Evidence that the advantage which the instrument, if genuine, would have given has been obtained, or that the injury which such an instrument could inflict has been accomplished, sufficiently shows an intent to defraud. Signing a fictitious name, or

the impersonation of another, shows guilty intent and justifies a conviction.

In the present case we have direct evidence, the testimony of witness Charles Appel, that appellant forged a fictitious name to the check (R. 135, 163, 164, 193). He then uttered and published this forged check at a business house where he had done business for a number of years and received full value therefor. The amount of money which he obtained from the Northern Commercial Company has apparently not been repaid to this date.

Another significant point for consideration in arriving at appellant's intent is the fact that the amount "Four Hundred Ninety-Six Dollars and Eighty Cents" on the check, plaintiff's exhibit No. 1, appears on the check in typewriting as well as by the impression of the F & E check protector No. 2758148. It is to be noted that this is not true in regard to plaintiff's exhibit 4 and plaintiff's exhibit 5. It may logically be concluded that appellant, in planning what he believed to be a "perfect crime" decided, after he had typed in the words "Four Hundred Ninety-Six Dollars and Eighty Cents", to improve on his masterpiece by passing the check through the check protector at the Townsend Typewriter Shop, which machine was readily accessible to him. This conclusion is supported by the fact that, according to Mr. Jefferson's testimony (R. 247-248), the check was prepared on the morning of February 9th. If the lease had been prepared at that time Wosdon P.

Lang would have given the check to Mr. Jefferson and he in turn would have received the lease. There is nothing in the record to indicate that Jefferson was reluctant, or had declined, to accept the check with the amount being merely typewritten thereon. Inasmuch as no objection was made to this check on the morning of the 9th, Wosdon P. Lang, if he existed, would have had no reason whatsoever to have gone to the trouble of going into the City of Anchorage and having the check passed through a check protector. The common ordinary experiences of mankind would lead us to believe that Wosdon P. Lang would not do a thing which, under the circumstances, was unnecessary. However, in considering the background of the appellant, his prior criminal record, and the painstaking care he took to make this the "perfect crime", it seems quite logical that he, to add to the appearance of the authenticity of this check, would be the one who passed it through the F & E check protector No. 2758148.

The Court very carefully instructed the jury on the matter of criminal intent in Instructions 8 and 9 (R. 12-14). Whether or not there existed an intent to defraud was a question for the jury to determine and the Court was, therefore, correct in denying appellant's motion for judgment of acquittal and submitting the case to the jury.

State v Dobbins, 351 Mo. 796; 174 S. W. 2d 171

37 C.J.S., Sec. 105, page 106.

FOURTH POINT RAISED: 4. THE TRIAL COURT DID NOT ERR IN DENYING APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL AS TO COUNT II SINCE THAT COUNT SUFFICIENTLY CHARGED THE CRIME OF UTTERING AND PUBLISHING A FORGED CHECK.

The pertinent part of Count II of the Indictment reads as follows:

> The said Will Key Jefferson * * * then and there having in his possession a check with a false, forged, and counterfeit signature written on the face thereof in the following tenor: (setting forth the check) did with intent to injure and defraud, wilfully, feloniously, knowingly, and unlawfully utter and publish as true and genuine to one Henry Cole, said false, forged and counterfeit signature and check, * * *.

In view of the fact that this count plainly and clearly charges the defendant with wilfully and knowingly uttering and publishing a forged check with intent to injure and defraud, it appears that no argument is necessary. The words wilfully and knowingly are defined in the following cases:

Screws v. U. S., 325 U. S. 101
Spies v. U. S., 317 U. S. 492, 497
U. S. v. Murdock, 290 U. S. 389, 394
Zimberg v U. S., 1 Cir., 142 F. 2d 132, 137
Wilton v. U. S., 9 Cir., 156 F. 2d 433, 434

FIFTH POINT RAISED: 5. THAT THE TRIAL

COURT DID NOT ERR IN GIVING INSTRUCTION 6-A AND THAT THE SAME IS A CORRECT STATEMENT OF THE LAW.

Instruction No. 6-A (R. 12) reads as follows:

> If any person knowingly, wilfully, fraudulently and with criminal intent signs a fictitious name to a check as drawer thereof, that is to say, signs the name of some person not in existence or not known to be in existence, with intent to represent such signature to be true and genuine, and with intent to defraud some other person, the person who so signs the fictitious name is guilty of forgery just as though the name so signed to the check was the name of some living and known person.

The memorandum of exceptions to instructions (R. 31), reads as follows:

> MR. DAVIS: Except to Instruction 6-A; all of No. 7; and to No. 8. That is all of those.

It is urged that the exception to Instruction 6-A be disregarded inasmuch as appellant failed to comply with Rule 30, Federal Rules of Criminal Procedure, which reads in part as follows:

> No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, **stating distinctly** the matter to which he objects and the **grounds of his objection.** (Emphasis supplied.)

Furthermore, this specification should not be con-

sidered by the Court inasmuch as appellant has completely failed to comply with the requirements of Rule 20, section 2, subsection d, Rules of the United States Circuit Court of Appeals for the Ninth Circuit, as amended March 20, 1946.

To constitute the crime of forgery, the name alleged to be forged need not be that of any person in existence. It may be wholly fictitious if the instrument is made with intent to defraud and shows on its face that it has sufficient efficacy to enable it to be used to the injury of another.

Meldrum v. U. S., 9 Cir., 151 F. 177, 181
Buckner v. Hudspeth, 10 Cir., 105 F. 2d 393 395
Milton v. U. S., USCA DC, 110 F 2d 556, 560
37 C.J.S., Sec. 10, p. 39

SIXTH POINT RAISED: 6. THE TRIAL COURT DID NOT ERR IN GIVING INSTRUCTION 7.

Instruction No. 7 (R. 12) reads as follows:

> The fact, if it be a fact, that the defendant offered to refund to the Northern Commercial Company the amount of the check described in the indictment, provided said check were then returned to him, is no such defense to the charges contained in either count of the indictment as to justify acquittal if you find beyond reasonable doubt that the defendant knowingly and wilfully and with intent to defraud, forged the check as charged in the first count of the indictment, or that the defendant knowingly and wilfully and

with intent to defraud, uttered and published said check, as charged in the second count of the indictment.

Inasmuch as the memorandum of exceptions to instructions (R. 30-31) reflects that appellant did not state distinctly the portion of instruction 7 to which he objected, nor did he distinctly state the grounds of his exception, as required by Rule 30, Federal Rules of Criminal Procedure, the same should not now be considered by this Court.

Furthermore, this specification should not be considered by the Court inasmuch as appellant has completely failed to comply with the requirements of Rule 20, section 2, subsection d, Rules of the United States Circuit Court of Appeals for the Ninth Circuit, as amended March 20, 1946.

Instruction 7, when considered with the entire charge of the Court, clearly states the law applicable to the facts of the present case.

Appellant, in his brief (p. 15-16), asserts that it was an uncontroverted fact that appellant attempted to pay the money and redeem the check. A search of the entire record does not substantiate such an assertion. It does substantiate the fact that appellant made frantic efforts to redeem the check but that his attempts to repay the check were only incidental to his recovering possession of the check. The record shows, and the jury apparently so found, that appellant's efforts to regain possession of the check were made to

regain possession of incriminating evidence and not for the purpose of reimbursing the company defrauded, namely, the Northern Commercial Company.

SEVENTH POINT RAISED: 7. THE TRIAL COURT DID NOT ERR IN GIVING INSTRUCTION NO. 8 INASMUCH AS SAME IS A CORRECT STATEMENT OF THE LAW.

Instruction 8 (R. 12-13) reads as follows:

> To constitute the crime charged in either count of the indictment in this case, it is not necessary that the defendant intended to defraud or injure any particular person, whether a natural person, a partnership or a corporation, but it is sufficient to constitute the crime charged in either count if it is established beyond reasonable doubt that the defendant committed the essential facts constituting the offense, and in so doing intended thereby to injure and defraud any person, or some person, either the said Henry Cole, or the Northern Commercial Company, or the People's National Bank of Paducah, Kentucky, or some other person.

Inasmuch as the memorandum of exceptions to instructions (R. 31) reflects that appellant did not state distinctly the portion of Instruction 8 to which he objected, nor did he distinctly state the grounds of his exception, in accordance with Rule 30, Federal Rules of Criminal Procedure, the same should not now be considered by this Court.

Furthermore, this specification should not be con-

sidered by the Court inasmuch as appellant has completely failed to comply with the requirements of Rule 20, section 2, subsection d, Rules of the United States Circuit Court of Appeals for the Ninth Circuit, as amended March 20, 1946.

Where, as in the present case, intent to defraud was alleged generally it is sufficient to show an intent to defraud anyone. In the present case the evidence adequately establishes that the Northern Commercial Company was defrauded of the sum of $496.80. A cursory reading of Section 4861 Compiled Laws of Alaska 1933 readily reveals that the Court's Instruction No. 8 is a correct statement of the law.

> EIGHTH POINT RAISED: 8. THE TRIAL COURT DID NOT ERR IN GIVING INSTRUCTION NO. 3, LINES 10 to 15, SINCE THE SAME IS A CORRECT STATEMENT OF THE LAW.

Instruction No. 3, lines 10 to 15 (which appear as lines 7 to 12 in the record as filed in this Court - R. 7), reads as follows:

> The allegation that defendant did "utter and publish" a certain check alleged to have been forged is supported by any evidence that he offered to pass or deliver said check and did pass and deliver it to some other person as a genuine instrument, declaring ar asserting, directly or indirectly, by words or acts, that the check was good.

Inasmuch as the memorandum of exceptions to in-

structions (R. 30-31) reflects that appellant did not distinctly state the grounds of his exception the same should not now be considered by this Court under the provisions of Rule 30, Federal Rules of Criminal Procedure.

Furthermore, this specification should not be considered by the Court inasmuch as appellant has completely failed to comply with the requirements of Rule 20, section 2, subsection d, Rules of the United States Circuit Court of Appeals for the Ninth Circuit, as amended March 20, 1946.

Instruction No. 3 is a correct statement of the law when considered as a whole and when considered in connection with the entire charge of the Court.

Where, as in the present case, a person knowingly passes a forged instrument as genuine, it is conclusive of his intent to defraud.

> **Jordan v. State,** 127 Ga. 278; 56 S. E. 422
> **Bullington v. State,** 123 Neb. 432; 243 N. W. 273

Since intent is incapable of direct proof, any competent evidence of facts and circumstances indicative of accused's intention is admissible; but circumstances having no probative force as to accused's intent are not admissible. Acts of deception, declarations, and misstatements in connection with the false instrument or the uttering thereof are admissible, as is also evidence of a scheme to defraud. The benefit obtained by accused, the disposition made by accused of pro-

ceeds derived from the uttering of the forged instrument, or the injury occasioned to the person to whom the instrument was passed, may be shown. The uttering of the note charged to be forged is admissible to show the intent with which it was written; but it would seem that the act claimed to be a forgery must in some sense be established before such evidence will be admitted. Accused's indorsement of fictitious paper is also admissible to show his intent to defraud by means of such writing, although the indorsement is not set forth in the indictment.

37 C.J.S., Sec. 87, p. 96

NINTH POINT RAISED: 9. THE TRIAL COURT DID NOT ERR IN GIVING INSTRUCTION 4, LINES 8 TO 12, SINCE THE INSTRUCTION CONSIDERED IN ITS ENTIRETY, AND IN CONNECTION WITH THE REMAINDER OF THE COURT'S CHARGE, IS A CORRECT STATEMENT OF THE LAW.

Instruction No. 4, lines 8 to 12, of the original instructions now on file in the District Court, appears as lines 6 to 9 in the record as filed in this Court (R. 9), and reads as follows:

> Each count of the Indictment charges a separate offense which must be considered and acted upon by itself. To each count the defendant has pleaded not guilty, which plea is a denial of the charge and puts in issue every material allegation thereof.

The memorandum of exceptions to instructions (R. 30) reads, in part, as follows:

> MR. DAVIS: I except to the giving of Instruction * * * No. 4, Lines 8 to 12, inclusive.

Inasmuch as the memorandum of exceptions to instructions (R. 30-31) reflects that appellant did not distinctly state the grounds of his exception the same should not now be considered by this Court under the provisions of Rule 30, Federal Rules of Criminal Procedure.

Lines 13 to 16 inclusive of Instruction No. 4, of the original instructions now on file in the District Court, appear as lines 10 to 13 in the typewritten record now on file in this Court (R. 9), and read as follows:

> It therefore becomes the duty, and it is incumbent upon the Government to prove every material element of the charge contained in each count of the indictment to your satisfaction beyond a reasonable doubt.

Apparently, appellant is now assigning as error lines 13 to 16 inclusive of the original instructions of the Court, which appear as lines 10 to 13 inclusive in the typewritten record (R. 9), to which no exception was taken in the lower Court.

It is urged that this specification should not be considered by the Court inasmuch as appellant has completely failed to comply with the requirements of Rule 20, section 2, subsection d, Rules of the United States Circuit Court of Appeals for the Ninth Circuit, as

amended March 20, 1946.

Furthermore, it is urged that this specification should not now be considered by this Court under the provisions of Rule 30, Federal Rules of Criminal Procedure, which reads in part as follows:

> No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection.

Since no objection was made, or exception taken, to that portion of Instruction No. 4 as given by the trial court which appellant is now apparently assigning as error, and since no prejudice to appellant resulted by the giving of this instruction, this specification of error should not now be considered.

The rule consistently followed by this Court is that an error assigned to a charge will not be considered on review in the absence of an exception.

Fredrick, et al. v. U. S., CCA 9, 163 F. 2d 536 549
Waggoner v. U. S., CCA 9, 113 F. 2d 867, 868
Hargreaves v. U. S., CCA 9, 75 F. 2d 68, 73
Smith v. U. S., CCA 9, 41 F. 2d 215, 216
Kearnes v. U. S., CCA 9, 27 F. 2d 854, 855
Alvarado v. U. S., CCA 9, 9 F. 2d 385, 386
Lee Tung v. U. S., CCA 9, 7 F. 2d 111
Coleman v. U. S., CCA 9, 3 F. 2d 243
Feigin v. U. S., CCA 9, 3 F. 2d 866, 867
Joyce v. U. S., CCA 9, 294 F. 665

Raffour v. U. S., CCA 9, 284 F. 720
Cabiale v. U. S., CCA 9, 276 F. 769
Henry Ching v. U. S., CCA 9, 264 F. 639
Vedin v. U. S., CCA 9, 257 F. 550, 552
Andrews v. U. S., CCA 9, 224 F. 418, 419

In this connection it is significant to note that in the opening statement by appellant, made by Mr. Davis at the trial of the case on December 18, 1946, we find the following statement (R. 52):

> As you already know, Mr. Jefferson is here charged with the crime of forgery, and in the second count in the same indictment he is charged with uttering and publishing that check. Now, as everybody has agreed, the indictment is only a charge; it is not evidence. But it is going to be necessary for the Government here to prove each and every allegation of that indictment, **to your satisfaction,** beyond a reasonable doubt, or you must bring in a verdict of not guilty. (Emphasis supplied.)

Furthermore, the phrase "beyond a reasonable doubt" without any words of modification appears in Court's instructions No. 4 (R. 9), No. 5 (R. 10), No. 6 (R. 11), No. 8 (R. 13), No. 9 (R. 14), No. 12-A (R. 16). Instruction No. 11 (R. 14-15) accurately and explicitly defines the term "reasonable doubt".

In **Wilton v. U. S.,** 156 F. 2d 433, under somewhat similar circumstances, this Court stated as follows:

> * * * Appellant also complains that "the charge amounted to a direction to find the defendant

> guilty if the main facts were **believed** by the jury to be true." The point being that mere belief was sufficient as distinguished from the requirement that the belief must be beyond reasonable doubt. However, the instructions abound in expressions that such belief must be beyond a reasonable doubt.

Inasmuch as the Government is bound to prove each and every allegation of the indictment beyond a reasonable doubt in the absence of a failure of proof it would follow that whether or not such proof was made would be a matter to be determined by the members of the jury.

> TENTH POINT RAISED: 10. THE TRIAL COURT DID NOT ERR IN DENYING APPELLANT'S MOTION FOR CHANGE OF VENUE.

Inasmuch as appellant did not designate that portion of the record pertaining to the motion and counter-motion in connection with the change of venue, it should not now be considered by this Court.

Rule 19, paragraph 6, of the Rules of the United States Circuit Court of Appeals for the Ninth Circuit, reads in part:

> If parts of the record shall be designated by one or both of the parties, or if such parts be distinctly designated by counsel for the respective parties, the Clerk shall print * * * **and the Court will consider nothing but those parts of the record** and the points so stated in the record. (Emphasis supplied.)

Accused in a criminal case has no absolute right to a change of venue. Such right depends on a showing of cause to be made by him, and on compliance with the statutory provisions on the subject. There is a general rule, affirmed by statute in some jurisdictions, that an application for a change of venue is addressed to the sound discretion of the trial court, and in absence of an abuse of discretion, its denial of the application is not error. The discretion required to be exercised is a sound legal discretion, not a mere arbitrary action resting on whim, caprice, or bias, and should be exercised with caution. * * *

22 C.J.S., Sec. 192, pp. 303, 304, 305

In the present case there is no showing that the lower Court abused its discretion in denying appellant's motion for change of venue. As a matter of information for this Court, appellant's motion for a change of venue was supported by 14 affidavits. The countermotion filed by the Government was supported by 33 affidavits reflecting that accused could receive a fair and impartial trial in the Third Division of the Territory of Alaska.

Following the Court's denial of appellant's motion for change of venue, and on December 12, 1946, a stipulation was entered into whereby it was agreed that the case be tried by a special venire, appellant, however, reserving his right to object to the ruling of the trial court in refusing to order a transfer of the place of trial of this cause in the event of an appeal. Forty-

six jurors were examined in obtaining a jury of 12 regular jurors and 2 alternate jurors. Under Section 5318 CLA 1933, subdivision 8, anyone in the employment of the Federal Government is subject to challenge for cause by either the plaintiff or defendant and numerous governmental employees were challenged for cause. No unusual difficulty was encountered in empanelling the jury.

Since appellant elected not to designate the portion of the record pertaining to his motion for change of venue, and since the same is not properly before this Court, it should not now be considered.

Storm v. U. S., 94 U. S. 76
England v. Gebhardt, 112 U. S. 502

ELEVENTH POINT RAISED: 11. THE CONVICTION IS NOT BASED ENTIRELY UPON CIRCUMSTANTIAL EVIDENCE, BUT IS BASED UPON DIRECT EVIDENCE AND STRONG CIRCUMSTANTIAL EVIDENCE.

Direct evidence is evidence which if believed proves the existence of the fact in issue without any inference or presumption.

31 C.J.S. Sec. 2, p. 505

Circumstantial evidence is evidence which, without going directly to prove the existence of a fact, gives rise to a logical inference that such fact does exist.

31 C.J.S. Sec. 161, p. 871

In the present case, witness Appel, testified in substance that in his opinion the check in question, Plaintiff's Exhibit No. 1, was forged by appellant (R. 135, 163, 164, 193). This testimony goes directly to the fact in issue, that is, whether Jefferson did or did not forge the check in question. It would therefore seem that appellant's statement that the conviction in this case rests solely upon circumstantial evidence is inaccurate, and without foundation, both as to the law and as to the facts.

Section 4014 Compiled Laws of Alaska 1933, reads as follows:

> In any proceeding before a court or judicial officer of the Territory of Alaska where the genuineness of the handwriting of any person may be involved, any admitted or proved handwriting of such person shall be competent evidence as **a basis for comparison** by witness or **by the jury,** court or officer conducting such proceeding, **to prove or disprove such genuineness.** (Emphasis supplied.)

Thus we have in this case documentary evidence from which the jury might logically have concluded that appellant forged the signature "Wosdon P. Lang" on Plaintiff's Exhibit 1. If such conclusion was made by the jury after comparing the questioned signature with the proven standards, this alone would have been sufficient evidence to warrant a conviction.

In addition to the direct opinion evidence, and docu-

mentary evidence mentioned above, we find strong circumstantial evidence. Among these circumstances are the appellant's financial condition during this period of time; the fact that he inquired of Fred Lange regarding the names of banks in Paducah, Kentucky, and the fact that the check was forged on one of the banks mentioned by Fred Lange; the fact that the check was written on appellant's typewriter; the fact that appellant had easy access to the check protector which made the impression on plaintiff's Exhibit No. 1; the fact that the amount Four Hundred Ninety Six Dollars and Eighty Cents was typed on the check on a typewriter rented by appellant and afterwards the amount was impressed on the check by the check protector accessible to appellant; and the fact that appellant made no effort to reimburse the Northern Commercial Company, but did make repeated offers to pay the amount of the check always upon the condition that the check be returned to him before he would make payment.

CONCLUSION

I

The indictment states facts sufficient to charge the crime of forgery and the crime of uttering and publishing a forged check.

II

The Court did not err in denying appellant's motion to strike the testimony of the government's expert witness Appel.

III

The Court did not err in denying appallant's motion for a judgment of acquittal.

IV

The trial court's instructions, when considered as a whole, correctly stated the law of the case, and were fair to the defense.

V

The Court did not abuse its discretion in denying appellant's motion for a change of venue.

VI

The conviction is based on direct evidence and strong circumstantial evidence.

There appears to have been no error, prejudicial or otherwise, in the trial of the case, and no grounds for a reversal of the judgment. The appellant was given a fair and impartial trial, and was found guilty of the crimes charged by a jury of his peers under proper instructions and upon competent and sufficient evidence. No reason exists for upsetting the verdict of the jury, and the judgment of conviction should be affirmed.

Dated, Anchorage, Alaska, October 29, 1948.

Respectfully submitted,

RAYMOND E. PLUMMER,
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Attorney for Appellee.

No. 11814

In the United States Circuit Court of Appeals for the Ninth Circuit

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T. J. BRANDON, JR., with alias THOMAS JEFFERSON, WILL KEY JEFFERSON, Appellant

vs.

UNITED STATES OF AMERICA, Appellee

ON APPEAL FROM THE DISTRICT COURT FOR THE TERRITORY OF ALASKA, THIRD DIVISION

BRIEF FOR THE APPELLEE

J. EARL COOPER,
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Anchorage, Alaska
Attorney for Appellee

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BRIEF FOR THE APPELLEE

JURISDICTIONAL STATEMENT

The original appeal in this matter was remanded by the United States Circuit Court of Appeals for the Ninth Circuit for consideration of Appellant's motion for a new trial upon the ground of after discovered evidence. The order contains the following:

> While we retain jurisdiction of the appeal from the sentence, we order the cause remanded for the consideration by the District Court of these claims.

STATEMENT OF FACTS

On January 8, 1947 the jury returned a verdict finding Will Key Jefferson guilty of the crimes of forgery and uttering and publishing a forged check. On March 7, 1947 defendant filed a motion for new trial

upon the ground of newly discovered evidence, the newly discovered evidence being a copy of a purported lease between Jefferson and one Wosdon P. Lang which came into his hands subsequent to his trial. This motion was denied by the trial court in a written opinion.

Upon the hearing of defendant's motion for new trial, he introduced a copy of this purported lease as his Exhibit BB (R.15). Jefferson testified that this copy was a triplicate copy of a lease allegedly executed between himself and Wosdon P. Lang (R.33).

At the hearing Jefferson testified that he had no knowledge or recollection that this third copy of the lease had been made or was ever in existence (R.33). He further stated that until the lease (referring to Exhibit BB) was turned over to him by Elizabeth Dolan, he had never seen the lease; that he had never had the slightest knowledge of the lease; that he didn't even have any reason to believe that such a copy of the lease existed (R.47). At the same hearing Jefferson testified that of his own positive knowledge Lease BB was a genuine document which was executed on the 10th day of February, 1945 (R.51). According to Jefferson's own testimony he was personally present when Exhibit BB was executed and his signature appears thereon.

The copy of lease Exhibit BB, according to Jefferson, came to light unexpectedly, subsequent to his trial, in the hands of Mrs. Dolan, who had a lease on the

Deeleventh Apartments (R.33-34). According to Jefferson, the papers in which Mrs. Dolan found the lease had no connection with the bills or leases or other things concerning the apartment house. They were simply papers of transactions between Mrs. Dolan and Jefferson (R.48-49).

Mrs. Dolan testified that she found the lease BB among pictures and personal papers while searching for one of her withholding tax slips, preparatory to preparing her income tax return (R. 103, 134). Mrs. Dolan did not know how the particular slip got in that box (R.137).

Dolan allegedly had an existing lease on the Deeleventh Apartments on February 10, 1945. (R. 84, 93, 94). It was a lease from Emma R. Maresh to Mrs. Dolan through Jefferson under a power of attorney from Emma R. Maresh (R.93). Mrs. Dolan was subpoenaed duces tecum to produce her copy of such lease but was unable to produce any such lease (R.101-102). The subpoena also ordered her to produce copies of all leases in her possession which were executed subsequent to the date the Deeleventh Apartments were leased to her. No leases or copies of leases were produced by her (R.101-102).

Mrs. Dolan testified that Jefferson never turned over copies of other leases to her and that if he had turned Exhibit BB over to her, it would be the only copy of a lease he had ever given her (R.136). Other testimony also disclosed that Dolan never had copies

of any of the other leases for the apartment house (R. 43, 122).

Prior to the return of the indictment herein on October 6, 1946, the Deeleventh Apartments and Jefferson were involved in a foreclosure proceeding. This action was tried in July and August of 1946. There were over 1,000 exhibits introduced in the lien action (R.131). Mrs. Dolan in her affidavit states that she put this lease (Exhibit BB) away at the time of the trial of the foreclosure proceeding.

Jefferson had never contacted Mrs. Dolan to find if she had a copy of the lease in her possession (R.43, 82).

ARGUMENT

While the Appellant in his statement of points relied upon in his brief does not set forth each point under a separate heading, it is felt for the purpose of clarity and for the convenience of the Court, that it would be well for this brief to contain such a categorical arrangement.

FIRST POINT: 1. THE EVIDENCE IS NOT NEWLY DISCOVERED EVIDENCE.

In support of this point Appellee hereby incorporates as part of this brief and adopts by reference the trial court's opinion rendered at the conclusion of the hearing on the motion for new trial on the ground of newly discovered evidence, which has been designated as part of the record on this appeal.

SECOND POINT: 2. FORGOTTEN EVIDENCE IS NOT NEWLY DISCOVERED EVIDENCE.

Notwithstanding Jefferson's declarations to the contrary, the conclusion is inescapable that Jefferson had knowledge of the existence of the triplicate copy of the Lease BB. His signature appears thereon and according to his testimony he was personally present when the lease was executed. His testimony further reflects that he personally turned this copy of the lease over to Mrs. Dolan.

Forgetfulness or oversight of evidence or witnesses by applicant until after the trial is not ground for a new trial.

46 **C.J.,** Sec. 230, p. 259 and cases cited in footnote thereunder.

Were the rule otherwise and a new trial were to be granted on the basis of matters purportedly forgotten, it would place a premium on fraud and perjury and serve to defeat rather than to promote the ends of justice.

THIRD POINT: 3. DUE DILIGENCE ON THE PART OF APPELLANT TO OBTAIN EVIDENCE IN QUESTION PRIOR TO OR DURING THE TRIAL OF THE CASE WAS NOT EXERCISED.

Jefferson and Mrs. Dolan both testified that Jefferson had never contacted Mrs. Dolan to see if she had a copy of the lease in her possession. There is no

showing by the testimony of any witness or by affidavit that Jefferson made any effort to locate the triplicate copy of the lease Exhibit BB prior to trial. The complete absence of any such effort on his part would lead one to believe that he did not want this copy of the lease discovered until after trial.

No matter how material the testimony may have been, an applicant for a new trial on the ground of newly discovered evidence must have used ordinary diligence to discover and produce the evidence at trial.

46 **C.J.,** Sec. 222, p. 249 and cases there cited.

In **U.S.** v. **Johnson,** 142 F.2d, p. 588, the Court, on page 592, quotes **Berry** v. **State of Georgia,** 10 Ga. 511:

> Upon the following points there seems to be a pretty general concurrence of authority, viz.: that it is incumbent on a party who asks for a new trial, on the ground of newly discovered evidence, to satisfy the Court, 1st. That the evidence has come to his knowledge since the trial. 2nd. That it was not owing to the want of due diligence that it did not come sooner. 3rd. That it is so material that it would probably produce a different verdict, if the new trial was granted. 4th. That it is not cumulative only—viz.: speaking to facts, in relation to which there was evidence on the trial. 5th. That the affidavit of the witness himself should be produced, or its absence accounted for. And 6th, a new trial will not be granted, if the only object of

the testimony is to impeach the character or credit of a witness.

In **Wagner v. U.S.,** 118 F.2d, 801, the United States Circuit Court of Appeals for the Ninth Circuit, at page 802, in ruling upon this question, uses the following language:

> We do not regard them as meeting the requirements, and particularly requirement (e) of Johnson v. United States, 8 Cir., 32 F.2d 127, 130. We quote from the opinion: "There must ordinarily be present and concur five verities, to wit: (a) The evidence must be in fact, newly discovered, i.e., discovered since the trial; (b) facts must be alleged from which the court may infer diligence on the part of the movant; (c) the evidence relied on, must not be merely cumulative or impeaching; (d) it must be material to the issues involved; and (e) it must be such, and of such nature, as that, on a new trial, the newly discovered evidence would probably produce an acquittal." See also Isgrig v. United States, 4 Cir., 109F.2d131,194.

Particular attention is invited to subdivisions (a) and (b) above. In the instant case the Appellant has neglected and failed to show that the evidence was, in fact, newly discovered or that there was nothing in the hearing from which the Court could infer diligence on the part of Appellant.

FOURTH POINT: 4. THE GRANTING OF A NEW TRIAL RESTS IN THE SOUND DISCRETION OF THE COURT.

The action of the Court in refusing to grant a new trial on the basis of newly discovered evidence should be viewed in the light of whether or not there is a plain abuse of discretion. Unless such abuse is manifest, the ruling of the trial court should not be disturbed.

> In **U.S.** v. **Johnson,** 142 F. 588 at page 591:
> After such a review and consideration we do not have the right, where there are no improper exclusions, to substitute our findings of judgment for that of the trial court. We determine by the record only whether the trial judge might reasonably have reached the conclusion which he did.

In **Long** v. **U. S.,** 139 F.2d, 652, we find on page 654 the following expression by the Court:

> It is well settled that the matter of granting a new trial on after discovered evidence rests in the sound judicial discretion of the trial court, and an order refusing a new trial on that ground will not be disturbed on appeal in the absence of a plain abuse of discretion. Wulfsohn v. Russian-Asiatic Bank, 9th Cir., 11 F.2d, 715. And it is equally well settled that an application for new trial based upon that ground is not regarded with favor and will be granted with great caution.

An examination of the record on this hearing reveals that the trial court was fully justified in refusing to grant a new trial, and such refusal, in view of all the facts, was not an abuse of discretion.

CONCLUSION

I

Jefferson's guilt was passed upon by the trial jury.

II

The motion for new trial on the ground of newly discovered evidence was considered by the trial judge, who was familiar with the entire record and who was personally present and observed the witnesses as they testified.

III

The verdict of the jury and the ruling of the trial judge should not now be disturbed.

Dated, Anchorage, Alaska, February 8, 1950.

Respectfully submitted,

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